No. 08-____

IN THE

Supreme Court of the United States

ISABEL GUERRA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

JULIO C. CODIAS
Counsel of Record
The Four Ambassadors
925 Brickell Bay Drive
Tower 3, Suite 1243
Miami, Florida 33131
(305) 372-8875

Counsel for Petitioner

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether a criminal defendant should be severely and unconstitutionally penalized with a forfeiture order that had been vacated by the district court and not reinstated until after the defendant had filed her brief on appeal with the 11th Circuit Court of Appeals?

II.

Whether the ruling from the 11th Circuit Court of Appeals sustaining the illegal forfeiture because "it had not been appealed" was arbitrary and capricious and in conflict with its own rulings on the effect a vacatur has on a criminal sentence once the original order of forfeiture has been vacated?

III.

Whether the criminal forfeiture order entered is constitutionally defective since criminal forfeitures have been held to be a fine subject to application of the Eighth Amendment's excessive fines clause and whether the question of whether a fine is constitutionally excessive is subject to de novo review. U.S. Const., Amend. 8; *United States v. Bajakajian*, 524 U.S. 321, 336 n. 10 (1998), citing *Ornelas v. United States*, 517 U.S. 690, 697 (1996) and *Alexander v. United States*, 509 U.S. 544 (1993); and *Austin v. United States*, 509 U.S. 602 (1993).

PARTIES TO PROCEEDING

Pursuant to rule 14(b), the following identifies all of the parties appearing here and before the U.S. Court of Appeals for the Eleventh Circuit.

The petitioner here and appellant below is Isabel Guerra through her attorney, J.C. Codias, Esquire.

The appellees below and respondent here is the United States, through AUSA Luis M. Perez and AUSA Anne R. Schultz, appellate counsel.

CORPORATE DISCLOSURE STATEMENT

This case is a criminal case and there are no parent companies or non-wholly owned subsidiaries.

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OPINIONS BELOW

The opinion of the Court of Appeals was issued in the case of *U.S. v. Guerra* (Case No. 08-10873) on January 9, 2009 and was not reported. The District Court's Amended Judgment of Conviction, including order of forfeiture, was issued in the case of *U.S. v. Guerra* (Case No. 05-20144-CR-HUCK) on February 20, 2008 and was not reported.

JURISDICTION

This matter was originally decided by a federal jury on June 29, 2005, who found Petitioner guilty on all counts in the indictment and was sentenced on

August 25, 2005. The sentence, conviction and order of forfeiture was then appealed to the United States Court of Appeals for the Eleventh Circuit, whom vacated the sentence imposed on Petitioner on May 11, 2007 and remanded the case for re-sentencing.

Petitioner was re-sentenced on February 13, 2008 and the sentence, conviction and order of forfeiture was then appealed to the United States Court of Appeals for the Eleventh Circuit. The 11th Circuit ruled on this appeal on January 9, 2009 and a Petition for Rehearing En Banc was timely filed, and treating the Petition as a petition for rehearing by the panel, same was denied on March 16, 2009.

The mandate of this ruling has been stayed pending ruling from this Honorable Court on this Petition for Writ of Certiorari. Jurisdiction in this Honorable Court lies pursuant to 28 USC §1254.

STATUTES INVOLVED

This is an action involving Title 18 USC Sections 2; 371; 1347; 1956; and 982; Title 31 §§5324(a)(3) and §5317 and Title 42§1320a-7b(b). The pertinent texts are set forth in the appendix.

STATEMENT OF THE CASE

The Civil Case. On or about April 23, 2003, a civil case was started by the government by requesting a temporary restraining order and injunction against all the real and personal assets of Isabel Guerra, her mother Mrs. Isabel Santos, and her employee Isabel Canepa.

The caption for the civil case was *United States v. Brickell Orthopedics, et al.*, with Case No: 03-21059-Civ-Jordan/Brown. Isabel Guerra's sworn deposition

in the civil case was taken on July 23, 2004. This deposition was filed by in the subsequent criminal case. (R.doc. #205).

Ocean Medical and United Pharmacy were closed and put out of business. Overnight, Isabel Guerra's businesses were closed and she was left destitute and a pauper before one single allegation of wrongdoing had been proven before a court of law.

Isabel Guerra, her mother Mrs. Isabel Santos, and her employee Isabel Canepa were all listed as defendants in the civil case. Immediately upon being served with the civil complaint these three defendants denied the allegations of Medicare fraud (health care fraud) contained in the complaint and requested evidentiary hearings.

When compelled by district court to produce whatever evidence the government had about any Medicare fraud at Ocean Medical, the government did not have any. The case was set for a bench trial on the issue of the permanent injunction.

Mrs. Santos (the mother of Petitioner Isabel Guerra) was not charged in the subsequent criminal indictment with health care fraud nor with money laundering. Rather, she was charged with conspiracy to structure transactions in violation of 18 USC § 371. This charge was based on the fact that she had received checks from her company as payment for her work at Ocean Medical.

On or about June 7, 2005, these criminal charges against Mrs. Isabel Santos were dismissed by the district trial court. The order of dismissal was signed on July 5, 2005, and entered on July 7, 2005. (R.Doc. # 203).

A few days before the civil case was ready for trial, the government brought a criminal indictment in the criminal court and moved to stay the civil case indefinitely in the civil court. It became apparent that the sole purpose of this civil case was to go after all the assets of Isabel Guerra; her bank accounts; her home; her vehicles, etc., and to give the government more time to find evidence of health care fraud on the part of Petitioner herein.

The Indictment. Isabel Guerra was indicted on or about February, 2005. Upon learning that an indictment had been returned against her, she voluntarily surrendered to the FBI offices on Friday, February 25, 2005.

The indictment charged in count 1 with a conspiracy to impede the functions of the department of Human Services; to obtain by false and fraudulent pretenses money from the Medicare program in violation of 18 USC §1347; and to offer and pay remuneration to induce Medicare beneficiaries to become legitimate patients of Ocean Medical and of her 50% portion of United Pharmacy.

The 19 Medicare Fraud Counts. Isabel Guerra was charged with 19 identifiable charges of Medicare fraud which were the actual 19 counts in the indictment, later reduced to 15; nine (9) of these counts were against co-defendant Carlos Gonzalez at United Pharmacy based on the government lists provided in discovery, and six (6) counts were against Isabel Guerra at Ocean Medical. The order of forfeiture was sought based on these counts. (*See Indictment*)

The surviving 15 health care fraud counts in the indictment amounted to $15,820. The six (6) counts imputed to Isabel Guerra at Ocean Medical, namely,

counts 2, 4, 7, 12, 15, and 16, were all prescriptions from a Dr. Pedro Cuni. The total amount of the six (6) Ocean Medical counts was $7,000. (R. doc. #229 p. 9). The sought forfeiture was based on these "health care fraud" counts.

Not a single Medicare patient testified in this case as to any health care fraud in relation to any of the listed counts in the indictment as to whether or not they had the medical necessity for the prescribed items; or as to whether or not they had received the prescribed items in due course; or as to whether or not they had been economically induced by Isabel Guerra to receive services from either Ocean Medical or from United Pharmacy.

Not a single medical doctor was brought to testify in support of any allegation of Medicare fraud in relation to any of these patients; and no witness from the Medicare program testified in support of any "losses" caused by Isabel Guerra to the Medicare program thru her operation of Ocean Medical and/or her 50% ownership of United Pharmacy, except for Medicare fraud and abuse expert Ms. Tanya Moore that testified that in this case the Medicare program had not lost any monies whatsoever by the conduct of Isabel Guerra. (*Appeal* 05-14864-A)

The government tried to introduce lists of claims as part of its case in chief, however, the trial court ruled that these lists were to remote or tenuous to constitute, in and of themselves, instances of Medicare fraud, and that evidence of fraud was going to be needed to be introduced by the government, at which time the government then changed its prosecutorial theory mid-trial and advised the district court that it wanted these lists introduced for purposes of "corroboration only". (R.doc. # 162 p.29)

After the trial it was determined after trying to match the HICN numbers of patients used for corroboration purposes only, with the names of the patients, that counts 2, 4, 7, 12, 15, and 16, imputed to Isabel Guerra at Ocean Medical, had all been introduced for purposes of corroboration only. Isabel Guerra was convicted of counts that were introduced for corroboration purposes only and not as evidence of any Medicare fraud. (*Appeal* 05-14864-A)

Witness Stephen Robinson was the IRS expert on money laundering. He testified that tax evasion and money laundering are two separate and different violations; that if the monies from Medicare deposited into the Ocean Medical account or the 50% portion of Isabel Guerra at United Pharmacy account, were legitimate monies, that in that case the cashing of the checks by government informant Abanto did not constitute money laundering, and that he had no knowledge of any illegal activity made with the cash funds received by Isabel Guerra (R.doc.160 pp. 102-105, 124)

That all the checks from Ocean Medical were readily identifiable and properly signed; that he had no evidence that Isabel Guerra ever destroyed any records, and that he had no evidence whatsoever that any of the patients of Ocean Medical had not received the orthotics as prescribed by their doctors, which would have constituted health care fraud.(pp. 113-116)

Robinson further testified that he had no knowledge of any false claim ever made by Ocean Medical nor any knowledge that Ocean Medical ever paid any patient recruiters. (pp.11-118) At the end of Robinson's testimony the district court advised the government to focus on the issue of whether the funds used came from Medicare fraud indicating

"there may be some more evidence in that regard". (p.135)

Witness FBI S/A Wendy Evans indicated that Ocean Medical was servicing or had serviced 478 Medicare beneficiaries; (R.doc.#162 p.38) that Ocean Medical had been in business since 1995 but she had no evidence of any Medicare fraud during all these years.

Evans testified she had no evidence that the Medicare patients mentioned had not received their medications; that although she had personally added the 19 names of Medicare patients as the 19 counts in the indictment, she did not have the actual patient files and therefore the jury could not look at the Medicare patient files kept by Ocean Medical on the 19 counts in the indictment; that she only searched for two (2) patient files but was somehow "unable to identify the patient files"; and that she had no way of knowing anything about the actual patient files at United Pharmacy because she could not "go through them", because somehow she was "unable to locate the patient files" (pp.62-65)

That she was providing her opinion as to what the alleged imperfections in the paperwork meant, although all the contents in the paperwork seemed to be perfectly in order; (pp.66-85), and that she could have interviewed the Medicare patients had she wanted to, but chose instead not to talk to the Medicare patients themselves. (pp.96-104). That she knew she was supposed to provide any exonerating evidence discovered during her investigation to the prosecution and the defense. (pp.51-52) But although allegedly having interviewed 40 to 50 patients, Evans never provided the FBI 302 reports of interviews with

any Medicare patient to the defense, in violation of the Standing Discovery Order. (R.doc. #162 p.154)

Post-trial proceedings. Although there had been no evidence that any one single claim submitted for payment by Isabel Guerra involved any fraud whatsoever, the government simply added all the claims submitted by Ocean Medical during all the years it had been in operation, and all the claims submitted by United Pharmacy during all the years it had been in operation, namely $9,405,115, and asked the district court to find that all these claims were "fraud", and to sentence Isabel Guerra under the sentencing guidelines to a mandatory jail sentence based on these amounts alone. (*See* Government's PSR, p.16, #56) However, when questioned by the district court, the government admitted it did not have one single case from the 11th Circuit Court of Appeals justifying the calculations of losses used in this case to sentence Isabel Guerra to incarceration, (R.doc. #229 p.25) also admitting that in this case the Medicare patients had received the prescribed items. (R.doc. 162, p.8)

The district court advised the government that there were weaknesses in the way the government chose to try its case, and deferred to the 11th Circuit Court of Appeals on the issue of the sufficiency of the evidence presented by the government in this case. (R.doc. 162, p.23)

When questioned by the district court the government acknowledged at trial that it could not tie one single specific claim submitted by Isabel Guerra to any specific fraud, except the general allegation that it was a "paid beneficiary". (R.doc. # 162 p.171, 172) Appeal No: 05-14864-A.

The government finally admitted that the whole case against appellant Isabel Guerra was all based on the case agent's opinion. The district court was advised that the requested sentence suffered from both Booker constitutional and statutory violations and the case law was provided to the district court. (R.doc. #224) Again the district court was reminded that each claim of loss had to be proven to the jury and that the suggested sentence would take it beyond the statutory maximum (R.doc. #229 p.26)

On June 9, 2005, and since the government had indicated it had not been able to "locate" the patient files from United Pharmacy, the actual files were placed in order and were attempted to be shown to the jury by Isabel Guerra. The government objected to the introduction and the relevant United Pharmacy files were not seen by the jury. Later on that same date the jury found Isabel Guerra guilty on all counts. (R.doc. # 176)

The district court at trial questioned whether there was any evidence that any of the substantive counts in the indictment had been tied to any evidence of Medicare fraud which would allow the government to draw the inference that all claims ever submitted by Ocean Medical and United Pharmacy over the years were all Medicare fraud. (R.doc. #162 pp.169-173)

Sentence proceedings. At sentence on August 25, 2005, the district court agreed with the testimony of CMS Medicare expert Tanya Moore that there was no evidence in this case that the Medicare program had suffered any losses and as such it could not order restitution. (R.doc. #229 pp. 4-7). But then the district court reversed itself ruling that because of the "fraud" Isabel Guerra was being sentenced to 99 months in jail based on $9,405,114.90 in "losses" to

the Medicare program. (R.doc. # 230). A forfeiture order $9,405,114.90 was also entered as part of the sentence.

The notice of Appeal and subsequent appeal by Isabel Guerra. Petitioner Isabel Guerra timely filed her notice of appeal on September 2, 1995 and appealed to the 11th Circuit on or about December, 30, 2005. This Notice of Appeal stated that Petitioner Ms. Guerra was appealing both the conviction and the sentence imposed by the district court and specifically the order of forfeiture entered by the Court in the amount of $9,405,114.90. (*See* Notice of Appeal) R.Doc. #245

The ruling from the 11th Circuit Court of Appeals from the appeal by Isabel Guerra dated May 11, 2007.

On May 11, 2007, the 11th Circuit reversed and remanded this case for re-sentencing as to Petitioner Isabel Guerra. *United States v. Medina*. 485 F.3d 1291 (11th Cir. 2007) Appeal No: 05-14864-A (R.E. #2). The 11th Circuit in fact vacated the entire sentence of Isabel Guerra including the order of forfeiture. (*See Case)*

The government charged a multi-objective conspiracy pursuant to 18 USC §371which included payment of kickbacks and filing false or fraudulent claims along with substantives counts pursuant to 18 USC § 371. The 11th Circuit affirmed the kickbacks conspiracy against Guerra but only affirmed $11,820 in kickbacks. *Medina* at 2025.

The 11th Circuit Court properly ruled that there was no evidence of any actual nor intended losses. *Medina* at 2025

The 11th Circuit ruled that if found Guerra guilty of the 12 substantive health care fraud counts (the 12 kickback violations) because they occurred after Guerra signed the provider agreement on May 4, 2001, prohibiting the future payment of referral fees (kickbacks) and not because there was any evidence that these claims were either false or fraudulent. In other words not in violation of the health care statute which requires the submission for payment of false or fraudulent claims. *Medina* at 2025

"As to Guerra, the total amount billed to Medicare on the health care fraud claims that we affirm is only $11,820. We find these claims fraudulent not because they were based on illegitimate prescriptions, but because the patients or doctors received kickbacks after Guerra certified to Medicare that she would not pay such remunerations. There was no evidence presented that these claims were not medically necessary." (Order pp.23-24) *Medina* at 2025

The 11th Circuit clearly distinguished between health care fraud (18 USC §1347) and paying referral fees (kickbacks) in violation of 42 USDC 1320a-7b(2)(A). *Medina* at 2019). But that kickbacks alone is not sufficient to establish health care fraud. *Medina* at 2018

The 11th Circuit ruled that the false representations made by Guerra when signing the provider agreement on May 4, 2001, prohibiting the future payment of referral fees (kickbacks) were the only knowing misrepresentations ever made by Ms. Guerra. *Medina* at 2019

"No false representations had been made to Medicare when the claims in those counts were submit-

ted." *United States v. Medina*. 485 F.3d 1291 (11th Cir. 2007)

"To be interpreted as health care fraud, however, there must be some evidence present in the record that shows the patients were not legitimately prescribed the oxygen concentrators, or that Ocean and/or United States made false or fraudulent representations to Medicare on the patients' behalf. There is no such evidence here. Taken in the light most favorable to the government, this evidence merely establishes that Ocean's files contained misstatements about how much Ocean's patients used the oxygen concentrators. There is no evidence that this information was submitted to Medicare in any capacity." *Medina* at 2019

The Government's Position at the Re-sentence of Isabel Guerra. On January 18, 2008, the DOJ filed it sentencing memorandum with its position for the resentence of Isabel Guerra. (D.E. #538). This was the same position as in the previous sentence.

On page 7 of its Memorandum the DOJ then advanced a different formula asking the court to sentence Isabel Guerra based on the amounts actually paid by Medicare for legitimate claims, namely $7,641,968.98 requesting a new and different order of forfeiture in this amount.

This formula made no distinction as to how many claims were the result of kickbacks or how much was actually received from Medicare for these claims or whether these receipts constituted profits from the charged criminal activity and not only receipts, or whether these receipts had been commingled with other legitimate monies. (D.E. #538)

Petitioner Isabel Guerra's position at re-sentence. On December 10, 2007, Isabel Guerra filed her position at sentence opposing the government's sentence request of January 18, 2008. Ms. Guerra argued that the 11th Circuit had only affirmed $11,820 as the total for all the counts of kickbacks. (D.E. #527)

Ms. Guerra argued that a conspiracy to commit health care fraud and the 12 substantive counts is sentenced under § 2B1.1(a) of the Guidelines and has a base offense level of 6 (0-6 months). To go above this level there must be losses to the Medicare program. (D.E. #527, p.18).

Ms. Guerra argued that no restitution was warranted under 5E1.1 since there were no losses to any identifiable victim. The original sentence contained no restitution since there were no losses to Medicare.

Ms. Guerra also argued that no order of forfeiture was warranted pursuant to §5E1.4since the forfeiture in the criminal indictment was sought pursuant to the offenses charged in counts 1-20 in the indictment based on losses caused to Medicare by violations of the 18 USC §1347 health care fraud statute. (D.E. #574) DC 05-20144-CR-Huck

The government simply told the district court at sentence that every claim ever filed by Isabel Guerra was the result of a kickback and for the Court to use a different formula asking the court to enter a forfeiture order at the sentence of Isabel Guerra based on all the receipts actually paid by Medicare for all legitimate claims ever submitted over the years for a total of $7,641,968. This amount was used by the Court to enter a forfeiture order in that amount.

The forfeiture hearing of June 9, 2005. At this hearing S/A Evans testified that in her opinion every sin-

gle claim ever submitted to Medicare by both United Pharmacy and Ocean Medical was the result of a kickback and as such constituted fraud and as such constituted losses to Medicare in the amount of $9,405,114.90. (D.E. #169) Tr.6/9/05 P.26)

This amount of $9,405,114.90 represented the gross receipts or proceeds of both Ocean Medical and United Pharmacy over all the years they were in operation. No distinction was made as to whether this amount represented receipts from claims where kickbacks had been paid or not, and no distinction was made as to whether this amount represented profits from a criminal activity and not merely receipts of such activity.

The previous sentence of August 25, 2005. The district court acknowledged that the government did not prove, during the trial, that each and every claim filed by United was the result of a kickback having been paid. (DE 322:20) Appeal No: 05-14864-A.

But then the district court changed its ruling when it recalled that S/A Agent Evans testified at the forfeiture proceeding that in her opinion all the claims filed by United Pharmacy were "fraudulent". (DE 322:10, 12-11) Appeal No: 05-14864-A. This recollection by the district court was contrary to the evidence at trial.

This is exactly what happened at the re-sentence of Ms. Guerra on February 13, 2008. No new evidence whatsoever was introduced at this re-sentence and the district court again indicated it was its recollection that there had been testimony at the trial to the effect that every single claim was fraud because it was the result of a kickback. (D.E. # 583) Tr. 2/13/08 p.23). But this was precisely the ruling that was

vacated and reversed by the 11th Circuit Court of Appeals.

At the previous sentence of August 25, 2005 the district court found that there was no evidence in this case that the Medicare program had suffered any losses and as such it could not order restitution. (R.doc. #229 pp. 4-7). Appeal No: 05-14864-A. As such no restitution was ordered against Isabel Guerra because there had been no losses to the Medicare program. (R.doc. # 230) DC 05-20144-Cr-Huck.

At the new of sentence of February 13, 2008 government counsel suggested to the district court that the court should find that every single claim ever submitted by Ms. Guerra after she signed the provider application was the result of a kickback and as such health care fraud.

There was no evidence presented at trial or at sentence that every single claim ever submitted by Ms. Guerra was the result of a kickback. This was never be proven by a preponderance of evidence at sentence. This request was not satisfied with reliable and specific evidence as required by law. This request asked the district court to speculate as to the existence of facts which would permit a more severe sentence. At the previous sentence of August 25, 2005 the district court having found that legitimate claims resulting from a kickback are fraudulent claims the district court indicated that because of the "fraud" Isabel Guerra was being sentenced to 99 months in jail based on $9,405,114.90 in "losses" to the Medicare program, although having previously found that Medicare had suffered no losses and as such no restitution was being ordered. A forfeiture order in that amount was also entered. (R.doc. # 230) Appeal No: 05-14864-A.

The Order from the 11th Circuit dated January 9, 2009. In the 11th Circuit order of January 9, 2009 this Court found that Appellant Guerra "failed to pursue the issue of forfeiture on first appeal to this Court, she has waived the right to challenge the order now" because she "was satisfied with the amount ordered and now wishes to pursue the matter because she is unsatisfied" (*Order* page 8)

Presumably in support of this finding the order states on page 6 that when the government proffered the amount of $7,641,968.88, Guerra's counsel stated "we have no way of proving or disproving that proffer". This is a selective quote from a much larger sentence proceeding.

This simply means that the amounts proffered by the government are based on private internal computer printouts from government agencies which are provided to the government and bear no resemblance whatsoever to the substantive counts in the indictment and defense counsel has no way to verify each of the tens of thousands of individual claims, some of which may be several years in the past.

The real position of Ms. Guerra at re-sentence was filed in writing with the district court prior to the sentence hearing.

On May 21, 2007 Ms. Guerra filed her position at re-sentence indicating, *inter alia*, "[I]t is respectfully requested that the orders of forfeiture entered by this Honorable Court on January 11, 2006, and February 7, 2006, based on $9,405,114.90 in losses to the Medicare program be vacated." (D.E. # 451).

Again on December 9, 2007 Ms. Guerra filed her position at re-sentence indicating, inter alia, "[T]hat no restitution be ordered under 5E1.1 since there

were no losses to any identifiable victim and that no order of forfeiture be ordered under pursuant to §5E1.4 since the forfeiture in the criminal indictment was sought pursuant to the offenses charged in counts 1-20 in the indictment based on losses caused to the Medicare program by violations of the 18 USC §1347 health care fraud statute." (D.E. # 527)

There is no objective evidence in this case that Ms. Guerra ever intended to waive the issue of the forfeiture.

Appellant Guerra respectfully requested a Rehearing En Banc of this portion of the order as not based on the facts of this case which was denied on March 16, 2009.

History of prior proceedings pertaining to the forfeiture. On June 10, 2005 Appellant Isabel Guerra was found guilty of the criminal charges after a jury trial (D.E. # 176)

Forfeiture in this case was sought by the government pursuant to the health care fraud counts in the indictment, namely counts 1-20, the health care fraud counts (D.E. # 2 pp. 5-20).

Ms. Guerra contested the requested forfeiture order in the indictment and demanded a separate jury trial on the issue of the forfeiture. This trial followed immediately after the verdict in the criminal case by the same jury. (D.E. #171)(D.E. #180)

The district court acknowledged that the government did not prove, during the trial, that each and every claim filed by United was the result of a kickback having been paid. (D.E. 322:20) Appeal No: 05-14864-A.

But then the district court changed its ruling again when it recalled that S/A Agent Evans testified at the forfeiture proceeding that in her opinion all the claims filed by United Pharmacy were "fraudulent". (D.E. 322:10, 12-11) Appeal No: 05-14864-A. This recollection by the district court was contrary to the evidence at trial.

In the 11th Circuit's Order of May 11, 2007 the Court found that it could only affirm $11,820 in health care fraud. *United States v. Medina.* 485 F.3d 1291 (11th Cir. 2007)

On August 25, 2005 the district court orally pronounced the forfeiture of Appellant Guerra's interest in all the assets listed by the government as part of the sought forfeiture based on $9,405,114.90 in "losses" to the Medicare program.

On September 8, 2005 Petitioner herein filed her notice of appeal indicating she was appealing the order of forfeiture.

On September 14, 2005 the government published the preliminary order of forfeiture in a newspaper of general circulation. (D.E. # 268)

On September 29, 2005 third party claims were timely filed against the assets the government was trying to forfeit. As such the preliminary order of forfeiture was being challenged and therefore not final. (D.E. # 273)(D.E. # 294)

On November 16, 2005 a final order and judgment of forfeiture in the amount of $9,405,114.90 was also entered as part of the criminal sentence. (R.doc. # 308). This forfeiture order was part of the criminal sentence against Isabel Guerra.

On November 28, 2005 the district court reversed itself and *sua sponte* vacated the final order of forfei-

ture of November 16, 2005 ordering instead a bench trial on the issue of forfeiture. (R.doc. # 333) (*See Order*).

As of November 28, 2005 there was no final order of forfeiture to appeal. Appellant Guerra timely filed her notice of appeal on September 1, 2005. (D.E #245) The record on appeal was received by the Court of Appeals on November 21, 2005, and appellant Guerra was given 40 days until on or about December 31, 2005, to file her initial brief on appeal.

Appellant Guerra timely filed her initial brief on appeal on or about December 30, 2005. On December 30, 2005 there was no final order of forfeiture to appeal.

The district court entered its final order of forfeiture on February 7, 2006, well after the deadline for filing the initial brief on appeal, denying in part and granting in part third party claims against the assets being sought for forfeiture by the government. (D.E. # 386)

Appellant Guerra was at all times ready to appeal the forfeiture issue had there been a final order of forfeiture to appeal.

In fact on Appellant Isabel Guerra's first appeal to the 11th Circuit (Appeal No: 05-14864-A), in the Statement of the Issues section, the initial brief clearly reads on Issue III that . . . "and whether the forfeiture of real and personal property of Isabel Guerra in this case was unlawful as it was not based on any evidence that the proceeds reflecting these assets were derived from Medicare fraud which were traceable to the commission of the Medicare offense, as required by 18 USC §982 (a)(7)?"

On pages 13 to 35 of the initial brief Petitioner Guerra argued that there had been no evidence of

health care fraud and as such there could not have been any "proceeds" from health care fraud to satisfy the order of forfeiture.

On page 47 of Isabel Guerra's initial brief to the 11th Circuit it stated that on November 28, 2005, the district court *sua sponte* had vacated the final order of forfeiture it had entered on November, 17, 2005. (R.E. #18)

The entire initial and reply briefs on appeal addressed the fact that there were no proceeds from health care fraud present in this case and as such no forfeiture could have been legally ordered.

On July 10, 2006 the government filed its Answer Brief on Appeal before this 11th Circuit. There was no mention nor even suggestion in such brief that the sentencing issue of the forfeiture was not properly before the Court.

In fact, in its Answer Brief on Appeal of July 10, 2006 the government did not even mention the issue of the forfeiture order which Isabel Guerra had contested. Not in its Statement of the Case on page 1; not in its Jury Deliberations section on page 18; not in its Sentencing section on page 19; not in its Summary of the Argument section on page 31; nor in any of its arguments. The government simply abandoned this issue.

The 11th Circuit properly ruled on the issue of losses caused by health care fraud in its Order of May 11, 2007, ($11,820) by remanding this case for resentencing. *United States v. Medina*. 485 F.3d 1291 (11th Cir. 2007)

On the issue of health care fraud the 11th Circuit's opinion of January 9, 2009 properly ruled that Ms.

Guerra's base offense level is 6 plus 6 more levels for the $11,820 previously affirmed for a total offense level of 12 (10-16 months). (*Order* p. 9)

On the issue of money laundering the 11th Circuit properly ruled that since Ms. Guerra was not responsible for any losses to the Medicare program Ms. Guerra did not merit any additional levels under §2B1.1 of the Sentencing Guidelines since there is no provision equating value of laundered funds with "loss". (*Order* p. 9)

It follows that the same logic applies to the forfeiture order. Why should Ms. Guerra be liable for $7,600,000 (7.6 million) in forfeiture sought under the health care counts for which the 11th Circuit Court of Appeals only affirmed $11,820?

The remand of May 11, 2007 vacated the sentence and the case remanded for re-sentence as to Guerra.

On May 11, 2007 the 11th Circuit ruled on the original appeal of the criminal conviction and sentence of Isabel Guerra vacating the sentence and remanding the case for re-sentence. *See United States v. Medina*. 485 F.3d 1291 (11th Cir. 2007)

EFFECT OF THE ORDER OF FORFEITURE

As a result of this entire proceeding Petitioner Ms. Isabel Guerra lost her business Ocean Medical that she had owned and operated for more than 10 years; she lost her business at United Pharmacy where all prescriptions served were legitimate; she lost the inventories she had paid for in these two businesses; she lost all the monies that CMS owed her for legitimate services already provided to Medicare beneficiaries; she lost her commercial bank accounts; she lost her personal bank accounts; she lost her automo-

bile; and the home that she had bought as a dilapidated property spending over one year fixing and improving in order to make it habitable.

Ms. Guerra's mother's home was also taken and forfeited all pursuant to the allegations of "health care fraud" that never materialized. This once professional and hard working woman who had spent the last 30 years of her life working six and seven days a week was reduced to an indigent penniless status living with her minor daughter in a room at her brother's home. Ms. Guerra was also sent to prison and had to do about three years behind bars.

This kind of ferocious and Draconian order of forfeiture should be imposed only on those who actually commit Medicare fraud and cause losses to the Medicare program and not on a person whose only offense was to pay a few referral fees or commission to improve her business, a practice that is otherwise legal in many other fields of commercial endeavor in the free enterprise system.

I. WHETHER A CRIMINAL DEFENDANT SHOULD BE SEVERELY AND UNCONSTITUTIONALLY PENALIZED WITH A FORFEITURE ORDER THAT HAD BEEN VACATED BY THE DISTRICT COURT AND NOT REINSTATED UNTIL AFTER THE DEFENDANT HAD FILED HER BRIEF ON APPEAL WITH THE 11TH CIRCUIT COURT OF APPEALS?

A district court cannot vacate an order of forfeiture in a criminal case, which is part of the sentence imposed, and then wait until after the defendant files her appeal without the forfeiture component in order to enter the forfeiture order.

The 11th Circuit cannot use this scheme in order to later rule that the order of forfeiture "was not appealed" by the defendant even after the 11th Circuit had itself vacated the previous order of forfeiture. In its ruling of May 11, 2007 the 11th Circuit never ruled that the forfeiture had not been appealed nor did it affirm the forfeiture order. This ruling does not promote respect for the judicial system or the administration of justice.

Definition of Appeal. In civil practice, the complaint to a superior court of an injustice done or error committed by an inferior one, whose judgment or decision the court above is called upon to correct or reverse.

An "appeal" in equity is a trial de novo. *Simmons v. Stern*, C.C.A.N.M., 9 F.2d 256, 259.

An "appeal" is a step in a judicial proceeding, and in legal contemplation there can be no appeal where there has been no decision by a judicial tribunal. Two things are essential to an appeal in its proper sense: First, the decision of a judicial tribunal, and, second, a superior court invested with authority to review the decision of the inferior tribunal. *People ex rel. Nelson Bros. Storage & Furniture Co. v. Fisher*, 273 Ill. 228, 25 N.E. 2d 785, 787.

II. WHETHER THE RULING FROM THE 11TH CIRCUIT COURT OF APPEALS SUSTAINING THE ILLEGAL FORFEITURE BECAUSE "IT HAD NOT BEEN APPEALED" WAS ARBITRARY AND CAPRICIOUS AND IN CONFLICT WITH ITS OWN RULINGS ON THE EFFECT A VACATUR OF A CRIMINAL SENTENCE HAS ONCE THE ORIGINAL ORDER OF FORFEITURE HAS BEEN VACATED?

A criminal sentence is a package of sanctions which may or may not include forfeiture. The vacatur of May 11, 2007 rendered the forfeiture order of August 25, 2005 invalid since this forfeiture order was part of the criminal sentence imposed on Isabel Guerra on August 25, 2005.

The new order of forfeiture entered on February 13, 2008 was part of a new sentence and was timely and fully appealed by Ms. Guerra to the 11th Circuit on Appeal 08-10873 since this subsequent order had not been vacated by the district court.

De-Novo. Forfeiture is a component of a criminal sentence. (United States Sentencing Guidelines §5E1.4). *See also* 18 U.S.C. §§3554; 1962; 1963; 3681; 3682; and 21 U.S.C. §853.

In *U.S. v. Tamayo*, 80 F.3d 1514, at 1520 (C.A.11 Fla. 1996) the 11th Circuit explained, that under this holistic approach, when a criminal sentence is vacated, it becomes void in its entirety; the sentence—including any enhancements—has "been wholly nullified and the slate wiped clean." *Id.*; *U.S. v. Grant*, 397 F.3d 1330, at 1336 (C.A.11 Ga. 2005) (The law of this circuit, as well as that of six other circuits is, as a general matter, that when a sentence

is remanded on appeal, the sentencing process commences again de novo); *Hall v. Moore*, 253 F.3d 624, at 628 (C.A.11 Fla. 2001); *U.S. v. Ramos*, 130 Fed. Appx. 415 (C.A.11 Fla. 2005)(The district court was permitted to consider the objections on remand because they were timely and because the sentencing process had started anew).

This Honorable Court has ruled on the effect a vacatur has on a criminal sentence in *North Carolina v. Pearce*, 395 U.S. 711, 721, 89 S.Ct. 2072, 2078, 23 L.Ed.2d 656 (1969).

In *U.S. v. Eldick*, 393 F.3d 1354 (C.A.11 Fla. 2004); *U.S. v. Trammell*, 385 F.Supp.2d 1215 (M.D. Ala. 2005) (The district court may approach defendant's re-sentencing as if it were sentencing him for the first time); *United States v. Cochran*, 883 F.2d 1012, 1017 (11th Cir. 1989)(quoting *North Carolina v. Pearce*, 395 U.S. 711, 721, 89 S.Ct. 2072, 2078, 23 L.Ed.2d 656 (1969).

Consequently, when a sentence is vacated and the case is remanded for re-sentencing, the district court is free to reconstruct the sentence utilizing any of the sentence components. *Id.*; *see also United States v. Jackson*, 923 F.2d 1494 (11th Cir.1991); In *United States v. Lail*, 814 F.2d 1529 (11th Cir.1987), the 11th Circuit Court held that if this were not the effect of its vacatur, it would have removed the illegal portion of the sentence and simply recalculated the sentence, instead of remanding to the district court for a time-consuming and expensive hearing. *Id.*

This the district court did in this case by imposing a new and different sentence including a new and different forfeiture order on February 13, 2008, the subject of the Petition for Rehearing En Banc filed by

Petitioner herein. The 11th Circuit was fully aware that there was a new and different forfeiture order.

In *U.S. v. Stinson*, 97 F.3d 466, at 469 (C.A.11 Fla. 1996), the 11th Circuit noted that whether the resentencing court was permitted to consider an upward departure turned on the effect of its order to vacate the defendant's original sentence. A criminal sentence is a package of sanctions that the district court utilizes to effectuate its sentencing intent consistent with the Sentencing Guidelines. *See United States v. Jackson*, 923 F.2d 1494, 1499 n. 5 (11th Cir.1991).

The 11th Circuit in *U.S. v. Oliver*, 941 F.Supp. 1109, at 1118 (M.D. Ala. 1996) stated that upon a successful collateral attack, a district court ". . . shall vacate and set the judgment aside and shall discharge the prisoner or re-sentence him or grant a new trial or correct the sentence as may appear appropriate." 28 U.S.C. § 2255.

In this case the 11th Circuit simply ignored all its precedent case law and ruled in violation of its own previous rulings.

III. WHETHER THE CRIMINAL FORFEITURE ORDER ENTERED IS CONSTITUTIONALLY DEFECTIVE SINCE CRIMINAL FORFEITURES HAVE BEEN HELD TO BE A FINE SUBJECT TO APPLICATION OF THE EIGHTH AMENDMENT'S EXCESSIVE FINES CLAUSE AND WHETHER THE QUESTION OF WHETHER A FINE IS CONSTITUTIONALLY EXCESSIVE IS SUBJECT TO DE NOVO REVIEW.

Application of the excessiveness test of this Court's ruling in *Bajakajian*, limited by the analysis of the

evidence in this case in the *Medina* opinion, requires that the forfeiture order be vacated.

This United States Supreme Court issued two opinions in 1993 which brought into modern use the long-unused Excessive Fines Clause of the Eighth Amendment, held that the Clause applied in an in personam criminal forfeiture action, and in a civil in rem forfeiture action, because the result was "punishment no different from a traditional fine."

Rather than itself articulate a test for excessiveness, however, this Court remanded each case to the district courts for a determination of excessiveness. *Alexander v. United States*, 509 U.S. 544 (1993); *Austin v. United States*, 509 U.S. 602 (1993); Edgeworth, Chapter 12, *Constitutional Protections*, p. 200. Under this reasoning, the forfeiture order under scrutiny at bar is a punitive "fine" subject to analysis under the Excessive Fines Clause of the Eighth Amendment.

A majority of this Court in *United States v. Bajakajian*, 524 U.S. 321 (1998), established the test for excessiveness that it had declined to articulate in Alexander and Austin. This Supreme Court, speaking through Justice Thomas, held that because the forfeiture (of the entire $357,144 the defendants legally owned but had failed to report they were taking out of the country) was a criminal in personam forfeiture, it was punishment and subject to the Excessive Fines Clause. *Id.* at 328; *see also United States v. Bollin*, 264 F. 3d 391, 418 (4th Cir. 2001) (a forfeiture imposed under 18 U.S.C. §982 (a)(1), the same provision at issue in *Bajakajian*, and as part of a criminal sentence is without question punitive and therefore subject to analysis under the Excessive Fines Clause).

This Supreme Court then held that the forfeiture would violate the Clause if it were grossly disproportional to the gravity of the defendants' offense (as this Court concluded was the case in *Bajakajian*). *Bajakajian*, at 334.

Where, as here, the funds and property seized were obtained in the course of operating a legitimate business, which caused no loss (to Medicare, or to the patients), it is plainly necessary under *Bajakajian* to apply the excessiveness test to the $7.6 million forfeiture order.

Ms. Guerra never waived her forfeiture argument. The new order of forfeiture imposed as part of the new criminal sentence on February 13, 2008 was timely appealed. The previous order of forfeiture of August 25, 2005 was vacated in its entirety when the sentence was vacated and the case remanded for resentence.

CONCLUSION

The order of forfeiture of $7,600,000 should be vacated and replaced with an order of forfeiture reflecting the $11,820 affirmed by the 11th Circuit.

WHEREFORE: Petitioner Isabel Guerra respectfully prays this Honorable court grant her Petition for Writ of Certiorari.

Respectfully submitted,

JULIO C. CODIAS
Counsel of Record
The Four Ambassadors
925 Brickell Bay Drive
Tower 3, Suite 1243
Miami, Florida 33131
(305) 372-8875

April 8, 2009

Counsel for Petitioner

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Filed 03/01/2005]

Case No. 05-20144-CR-HUCK
18 U.S.C. § 371
18 U.S.C. § 1347
42 U.S.C. § 1320a-7b(b)
18 U.S.C. § 1956
18 U.S.C. § 2
31 U.S.C. § 5324(a)(3)
18 U.S.C. § 982
31 U.S.C. § 5317

UNITED STATES OF AMERICA,

vs.

ISABEL GUERRA, CARLOS GONZALEZ, ISABEL CANEPA, PURA MEDINA, and ISABEL SANTOS,
Defendants.

INDICTMENT

The Grand Jury charges that:

GENERAL ALLEGATIONS

At all times relevant to this Indictment:

The Medicare Program

1. The Medicare Program ("Medicare") was a federal program that provided free or below-cost health care benefits to certain individuals, primarily the elderly, blind, and disabled. The benefits available under Medicare are prescribed by statute and by

federal regulations under the auspices of the United States Department of Health and Human Services ("HHS"), through its agency, the Centers for Medicare and Medicaid Services ("CMS"), which, prior to June 15, 2001,

* * * *

January 26, 2000 to on or about December 19, 2002. During that same time, ISABEL GUERRA was 50% owner and vice-president. On December 19, 2002, CARLOS GONZALEZ sold his share of the company to ISABEL GUERRA, who then became the president and sole owner. Defendant PURA MEDINA was a secretary and pharmacy technician at United. United was authorized by Medicare to submit claims to Medicare for reimbursement under Part B, of the cost of certain prescription drugs that United dispensed to Medicare beneficiaries.

12. ISABEL SANTOS and ISABEL GUERRA were mother and daughter, respectively. They shared signatory authority over Ocean's corporate bank account number 9983798061 at First Union National Bank.

13. CARLOS GONZALEZ and ISABEL GUERRA shared signatory authority over United corporate bank account number 2000006265339 at First Union National Bank.

COUNT 1

Conspiracy to Defraud the United States,
Commit Health Care Fraud and to Pay Kickbacks
(18 U.S.C. § 371)

1. Paragraphs 1 through 13 of the General Allegations section of this Indictment are realleged and incorporated as though fully set forth herein.

2. From in or around January 2000, and continuing through in or around April 2003, in Miami-Dade County, in the Southern District of Florida, and elsewhere, the defendants,

ISABEL GUERRA,
CARLOS GONZALEZ,
ISABEL CANEPA, and
PURA MEDINA,

did knowingly and willfully combine, conspire, confederate and agree with each other and with persons known and unknown to the Grand Jury:

(A) to defraud the United States by impairing, impeding, obstructing, and defeating, through deceitful and dishonest means, the lawful government functions of the United States Department of Health and Human Services in its administration and oversight of Medicare;

(B) to commit an offense against the United States, that is, to violate Title 18, United States Code, Section 1347, by knowingly and willfully executing, and attempting to execute, a scheme and artifice to defraud and to obtain, by means of materially false and fraudulent pretenses, representations, and promises, money and property owned by, and under the custody and control of, a health care benefit program, as defined in Title 18, United States Code, Section 24(b), that is, Medicare, in connection with the delivery of and payment for health care benefits, items, and services; and

(C) to commit an offense against the United States, that is, to violate Title 42, United States Code, Section 1320a-7b(b)(2)(A) by knowingly and willfully offering and paying remuneration (including any kickback and bribe) directly and indirectly,

overtly and covertly, in cash and in kind, to induce the referral of Medicare beneficiaries to a person for the furnishing and arranging for the furnishing of any item and service for which payment may be made in whole and in part by Medicare.

PURPOSE OF THE CONSPIRACY

3. It was a purpose of the conspiracy for the defendants and their co-conspirators to unlawfully enrich themselves through Ocean and United by: (a) submitting and causing to be submitted false and fraudulent claims to Medicare for the cost of DME, related prescription drugs, and other health care items and services; (b) paying kickbacks and bribes to patient recruiters so that they would provide the defendants and their companies with fictitious patients, thereby furthering

* * * *

(10) On or about March 15, 2002, ISABEL CANEPA and ISABEL GUERRA caused the submission of a false and fraudulent claim for reimbursement to Palmetto in the amount of $1,200 for a back brace purportedly prescribed to A.H., a Medicare beneficiary.

(11) On or about May 20, 2002, CARLOS GONZALEZ, ISABEL GUERRA, and PURA MEDINA caused the submission of a false and fraudulent claim for reimbursement to Palmetto in the amount of $1,520 for aerosol medications Albuterol and Ipratropium bromide purportedly prescribed to F.A., a Medicare beneficiary.

(12) On or about October 22, 2002, CARLOS GONZALEZ, ISABEL GUERRA, and PURA MEDINA caused the submission of a false and fraudulent claim

for reimbursement to Palmetto in the amount of $1,360 for aerosol medications Albuterol and Ipratropium bromide purportedly prescribed to LA., a Medicare beneficiary.

All in violation of Title 18, United States Code, Section 371.

COUNTS 2-20
Health Care Fraud
(18 U.S.C. §§ 1347 and 2)

1. Paragraphs 1 through 13 of the General Allegations section of this Indictment are realleged and incorporated as though fully set forth herein.

2. From in or around January 2000, and continuing through in or around April 2003, in Miami-Dade County, in the Southern District of Florida, and elsewhere, the defendants,

ISABEL GUERRA,
CARLOS GONZALEZ,
ISABEL CANEPA, and
PURA MEDINA,

in connection with the delivery of and payment for health care benefits, items, and services, did knowingly and willfully execute, and attempt to execute, a scheme and artifice to defraud a health care benefit program, as defined in Title 18, United States Code, Section 24(b), that is, Medicare, and to obtain, by means of materially false and fraudulent pretenses, representations, and promises, money and property owned by, and under the custody and control of Medicare, in connection with the delivery of and payment for health care benefits, items, and services.

PURPOSE OF THE SCHEME AND ARTIFICE

3. It was a purpose of the scheme and artifice for the defendants and their accomplices to unlawfully enrich themselves through Ocean and United by: (a) submitting and causing to be submitted false and fraudulent claims to Medicare for the cost of DME, related prescription drugs, and other health care items and services; (b) paying kickbacks and bribes to patient recruiters so that they would provide the defendants and their companies with fictitious patients, thereby furthering the Medicare billing fraud scheme; (c) paying kickbacks and bribes to Medicare beneficiaries/patients so that they would provide the defendants and their companies with patient information necessary to complete fraudulent Medicare claims, thereby furthering the Medicare billing fraud scheme; (d) concealing the submission of fraudulent Medicare claims, the receipt and transfer of fraud proceeds, and the payment of kickbacks; and (e) diverting fraud proceeds for the defendants' personal use and benefit.

MANNER AND MEANS OF THE SCHEME AND ARTIFICE

4. Paragraphs 4 through 10 of the Manner and Means of the Conspiracy section of Count 1 of this Indictment are realleged and incorporated by reference as though fully set forth herein as a description of the manner and means of the scheme and artifice.

EXECUTIONS OF THE SCHEME AND ARTIFICE

5. On or about the dates specified as to each count below, in the Southern District of Florida, and elsewhere, the defendants, identified as to each count below, in connection with the delivery of and payment for health care benefits, items, and services,

did knowingly and willfully execute, and attempt to execute, the above-described scheme and artifice to defraud a health care benefit program, that is, Medicare, and to obtain, by means of materially false and fraudulent pretenses, representations, and promises, money and property owned by, and under the custody and control of said health care benefit program:

Count	Defendants	Patient	Approximate Date of Claim	Medicare Claim Number	Items(s) Claimed: Approx. Amount Billed	Company
2	ISABEL CANEPA and ISABEL GUERRA	L.M.	03/14/00	100076819064000	E1401; portable oxygen tank: $300.	Ocean
3	ISABEL CANEPA and ISABEL GUERRA	A.F.	03/21/00	100082813656000	E1401; portable oxygen tank: $300.	Ocean
4	ISABEL CANEPA and ISABEL GUERRA	R.L.	04/07/00	100101824034000	L0565; back brace: $1,200.	Ocean
5	ISABEL CANEPA and ISABEL GUERRA	A.L.	05/12/00	100136824217000	L0565; back brace: $1,200.	Ocean
6	CARLOS GONZALEZ, ISABEL GUERRA, and PURA MEDINA	B.C.	02/08/01	101068859312000	J7608; Acetylcysteine: $760.	United

Count	Defendants	Patient	Approximate Date of Claim	Medicare Claim Number	Items(s) Claimed: Approx. Amount Billed	Company
7	ISABEL CANEPA and ISABEL GUERRA	M.G.	03/08/01	101109817997000	L0565, back brace: $1,200.	Ocean
8	ISABEL CANEPA and ISABEL GUERRA	R.F.	03/16/01	101081820878000	L3740; elbow orthosis: $1,300.	Ocean
9	CARLOS GONZALEZ, ISABEL GUERRA, and PURA MEDINA	M.M.	06/22/01	101206852921000	J7669; Metaproterenol sulfate: $800; J7608; Acetylcysteine: $760.	United
10	CARLOS GONZALEZ, ISABEL GUERRA, and PURA MEDINA	P.D.	06/26/01	101243864159000	J7669; Metaproterenol sulfate: $1,200.	United
11	CARLOS GONZALEZ, ISABEL GUERRA, and PURA MEDINA	J.P.	11/28/01	101339869049000	J7619; Albuterol: $300; J7644, Ipratropium bromide: $380.	United

12	ISABEL CANEPA and ISABEL GUERRA	C.G	11/29/01	1013608442500000	L1845; right and left knee braces: $1,800	Ocean
13	CARLOS GONZALEZ, ISABEL GUERRA, and PURA MEDINA	J.F.	12/26/01	1020228617270000	J7619; Albuterol: $300; J7644; Ipratropium bromide: $380.	United
14	ISABEL CANEPA and ISABEL GUERRA	S.M	12/28/01	1020118177200000	L1845; right and left knee braces. $1,800	Ocean
15	ISABEL CANEPA and ISABEL GUERRA	A.D.	02/12/02	1020658302200000	L0565; back brace: $1,300.	Ocean
16	ISABEL CANEPA and ISABEL GUERRA	A.H.	03/15/02	1020918398140000	L0565, back brace: $1,200.	Ocean
17	CARLOS GONZALEZ, ISABEL GUERRA, and PURA MEDINA	F.A.	05/20/02	1021718603750000	J7619; Albuterol: $760, J7644; Ipratropium bromide: $760.	United

Count	Defendants	Patient	Approximate Date of Claim	Medicare Claim Number	Items(s) Claimed: Approx. Amount Billed	Company
18	CARLOS GONZALEZ, ISABEL GUERRA, and PURA MEDINA	I.A	10/22/02	1023268762720000	J7619, Albuterol $600; J7644, Ipratropium bromide, $760.	United
19	ISABEL GUERRA and PURA MEDINA	I.A.	02/21/03	1031057877296000	J7619, Albuterol: $300; J7644; Ipratropium bromide: $380.	United
20	ISABEL GUERRA, and PURA MEDINA	I.A.	03/20/03	1030858687230000	J7644, Ipratropium bromide, $380.	United

All in violation of Title 18, United States Code, Sections 1347 and 2.

COUNT 21

Conspiracy to Commit Money Laundering (18 U.S.C. § 1956(h))

1. Paragraphs 1 through 13 of the General Allegations section of this Indictment are realleged and incorporated by reference as though fully set forth herein.

2. From in or around January 2000, and continuing through in or around April 2003, in Miami-Dade County, in the Southern District of Florida, and elsewhere, the defendants,

ISABEL GUERRA,
CARLOS GONZALEZ,
ISABEL CANEPA, and
PURA MEDINA,

did knowingly combine, conspire, confederate and agree with each other and with persons known and unknown to the Grand Jury to commit certain offenses under Title 18, United States Code, Section 1956, that is, to conduct and attempt to conduct financial transactions affecting interstate commerce, which financial transactions involved the proceeds of specified unlawful activity, knowing that the financial transactions were designed in whole and in part to conceal and disguise the nature, location, source, ownership, and control of the proceeds of specified unlawful activity, and knowing that the property involved in the financial transactions represented the proceeds of some form of unlawful activity, in violation of Title 18, United States Code, Section 1956(a)(1)(B)(i).

All in violation of Title 18, United States Code, Section 1956(h).

COUNTS 22-32
Money Laundering
(18 U.S.C. §§1956(a)(1)(B)(i) and (2)

1. Paragraphs 1 through 13 of the General Allegations section of this Indictment are realleged and incorporated by reference as though fully set forth herein.

2. On or about the dates specified below, in Miami-Dade County, in the Southern District of Florida, and elsewhere, the defendants,

ISABEL GUERRA,
CARLOS GONZALEZ,

ISABEL CANEPA, and
PURA MEDINA,

as specified in Counts 22 through 32 below, did knowingly conduct and attempt to conduct financial transactions affecting interstate commerce, as described in each count below, involving the proceeds of specified unlawful activity, knowing that the financial transactions were designed in whole and in part to conceal and disguise the nature, location, source, ownership, and control of the proceeds of specified unlawful activity, and knowing that the property involved in the financial transactions represented proceeds of some form of unlawful activity:

Count	Defendant(s)	Approx. Date	Description of Financial Transaction
22	CARLOS GONZALEZ	10/23/01	Transfer to M.A. of check #2423 in the amount of $10,800, drawn on United's account at First Union National Bank and payable to Florida Advertising Group.

Count	Defendant(s)	Approx. Date	Description of Financial Transaction
23	CARLOS GONZALEZ	10/23/01	Transfer to M.A. of check #2424 in the amount of $10,800, drawn on United's account at First Union National Bank and payable to Panorama Medico.
24	ISABEL GUERRA	10/23/01	Transfer to M.A. of check #1880 in the amount of $10,800, drawn on Ocean's account at First Union National Bank and payable to Florida Advertising Group.
25	CARLOS GONZALEZ	11/14/01	Transfer to M.A. of check #2486 in the amount of $10,800, drawn on United's account at First Union National Bank and payable to Panorama Medico.
26	CARLOS GONZALEZ	11/14/01	Transfer to M.A. of check #2488 in the amount of $10,800, drawn on United's account at First Union National Bank and payable to Florida Advertising Group.
27	ISABEL GUERRA	11/14/01	Transfer to M.A. of check #1908 in the amount of $10,800, drawn on Ocean's account at First Union National Bank and payable to Florida Advertising Group.
28	ISABEL GUERRA and ISABEL CANEPA	12/05/01	Transfer to M.A. of check #1943 in the amount of $10,800, drawn on Ocean's account at First Union National Bank and payable to Panorama Medico.
29	CARLOS GONZALEZ	12/06/01	Transfer to M.A. of check #2548 in the amount of $10,800, drawn on United's account at First Union National Bank and payable to Panorama Medico.
30	CARLOS GONZALEZ	12/06/01	Transfer to M.A. of check #2549 in the amount of $10,800, drawn on United's account at First Union National Bank and payable to Florida Advertising Group.
31	CARLOS GONZALEZ and PURA MEDINA	04/25/02	Transfer to M.A. of check #2947 in the amount of $10,800, drawn on United's account at First Union National Bank and payable to Florida Advertising Group.
32	CARLOS GONZALEZ and PURA MEDINA	04/25/02	Transfer to M.A. of check #2948 in the amount of $10,800, drawn on United's account at First Union National Bank and payable to Florida Advertising Group.

All in violation of Title 18, United States Code, Sections 1956(a)(1)(B)(i) and 2.

COUNT 33
Conspiracy to Structure Transactions
(18 U.S.C. § 371)

1. Paragraphs 1 through 13 of the General Allegations section of this Indictment are realleged and incorporated as though fully set forth herein.

* * * *

(14) On or about September 20, 2002, CARLOS GONZALEZ prepared checks numbered 1057, 1058, and 1059, from United account number 0450009139 at Interamerican Bank, each of which was in an amount of less than $10,000.

(15) On or about September 23, 2002, ISABEL SANTOS cashed check number 1057, in the amount of $4,800.

(16) On or about September 24, 2002, ISABEL GUERRA cashed check number 1058, in the amount of $5,200.

(17) On or about September 24, 2002, CARLOS GONZALEZ cashed check number 1059, in the amount of $7,609.

All in violation of Title 18, United States Code, Section 371.

FORFEITURE
(18 U.S.C. § 982)

(1) The Allegations contained in Counts 1 through 33 of this Indictment are realleged and incorporated by reference, as though fully set forth herein for the purpose of alleging forfeiture to the United States of America of certain property in which ISABEL

GUERRA, CARLOS GONZALEZ, ISABEL CANEPA, PURA MEDINA, and ISABEL SANTOS have an interest pursuant to the provisions of Title 18, United States Code, Sections 982(a)(1) and 982(a)(7) and Title 31, United States Code, Section 5317(c)(1)(A).

2. Pursuant to Title 18, United States Code, Section 982(a)(7), upon conviction of ISABEL GUERRA, CARLOS GONZALEZ, ISABEL CANEPA, and PURA MEDINA for the offenses charged in Counts 1-20 of this Indictment, these defendants shall forfeit to the United States all property, real or personal, that constitutes or is derived , directly or indirectly, from gross proceeds traceable to the commission of the offense, including but not limited to the items set forth below which constitutes property, or traceable to such property involved in the offenses charged:

a. As to ISABEL GUERRA., the sum of $10,087,318, which constitutes property, or traceable to such property involved in the offenses charged;

b. As to CARLOS GONZALEZ, the sum of $6,173,828, which constitutes property, or traceable to such property involved in the offenses charged;

c. As to ISABEL CANEPA, the sum of $2,546,166, which constitutes property, or traceable to such property involved in the offenses charged;

d. As to PURA MEDINA, the sum of $7,541,152, which constitutes property, or traceable to such property involved in the offenses charged;

e. One piece of real property located at 3924 Southwest 150th Court, Miami, Florida more fully described as LOT 15, IN BLOCK 2, OF KAYLA'S PLACE, ACCORDING TO THE PLAT THEREOF, AS RECORDED IN PLAT BOOK 157, AT PAGE 60, OF THE PUBLIC RECORDS OF MIAMI-DADE COUNTY, FLORIDA;

f. One piece of real property located at 192 La Paloma Road, Key Largo, Florida more fully described as Lot 22 in Block 1, of AMENDED PLAT OF WINSTON WATER-WAYS SUBDIVISON according to the Plat thereof, as recorded in Plat Book 42, at Page 144, of the Public Records of Monroe County, Florida;

g. One piece of real property located at 14914 Southwest 37th Terrace, Miami, Florida more fully described as Lot 19, Block 4, of VILLA SEVILLA, according to the Plat thereof, as recorded in Plat Book 141, at Page 16, of the Public Records of Miami-Dade County, Florida;

h. One 1999 Toyota 4Runner, VIN # JT3GN86 R7X0104519;

i. One 2003 BMW X5, VIN # 5UXFB33533 LH40188;

j. One 2004 GMC Yukon XL, VIN # 3GKEC16 Z34G302364;

k. One 2001 Chevrolet 3500, VIN # 1GCJC331 31F172491;

l. One 2002 Continental Trailer, VIN # 1ZJBE 14162M008424;

m. One 2003 Continental Trailer, VIN # 1ZJBA 31343M014236;

n. One 2003 34' Donzi Vessel, VIN # DNAF 60091203;

o. One 2002 Suzuki Motorcycle GSX1300RK2, VIN # JS1GW71A822101513;

p. One 2001 Toyota Camry, VIN # 4T1BF22 K81U969343;

q. One 2000 Ford Focus, VIN # 1FAFP3438 YW247907;

r. One 2000 Volkswagon Jetta GLS, VIN # 3VWSA29M4YM084580;

s. One 2003 BMW 325i SA, VIN # WBAET 37463NJ33177;

t. All funds on deposit and interest accrued thereto for Bank of America account number 3675540507;

u. All funds on deposit and interest accrued thereto for Bank of America account number 3437194997;

v. All funds on deposit and interest accrued thereto for Bank of America account number 3673304237;

w. All funds on deposit and interest accrued thereto for Bank of America account number 91000045965339;

x. All funds on deposit and interest accrued thereto for Bank of America account number 3439265170;

y. All funds on deposit and interest accrued thereto for Bank of America account number 3677610778;

z. All funds on deposit and interest accrued thereto for Colonial Bank account number 8033462279;

aa. All funds on deposit, funds associated with, and interest accrued thereto for Colonial Bank account number 8032898606;

bb. All funds on deposit and interest accrued thereto for Colonial Bank account number 8032898580;

cc. All funds on deposit and interest accrued thereto for Interamerican Bank account number 450009683;

dd. All funds on deposit and interest accrued thereto for Interamerican Bank account number 450009139;

ee. All funds on deposit and interest accrued thereto for First Union National Bank account number 13122051183837;

ff. All funds on deposit and interest accrued thereto for First Union National Bank account number 33120270206186;

gg. All funds on deposit and interest accrued thereto for First Union National Bank account number 9983798061; and

hh. All funds on deposit and interest accrued thereto for Washington Mutual Bank account number 39300004505691.

3. Pursuant to Title 18, United States Code, Section 982(a)(1), upon conviction of ISABEL

GUERRA, CARLOS GONZALEZ, ISABEL CANEPA, and PURA MEDINA for any of the offenses charged in Counts 21-32 of this Indictment, any of the defendants shall forfeit to the United States all property, real and personal involved in such offense, and any property traceable to such property, including but not limited to the following:

a. As to ISABEL GUERRA, the sum of $698,901, which constitutes property, or traceable to such property involved in the offenses charged;

b. As to CARLOS GONZALEZ, the sum of $450,051, which constitutes property, or traceable to such property involved in the offenses charged;

c. As to ISABEL CANEPA, the sum of $248,850, which constitutes property, or traceable to such property involved in the offenses charged;

d. As to PURA MEDINA, the sum of $450,051, which constitutes property, or traceable to such property involved in the offenses charged;

e. One piece of real property located at 3924 Southwest 150th Court, Miami, Florida more fully described as LOT 15, IN BLOCK 2, OF KAYLA'S PLACE, ACCORDING TO THE PLAT THEREOF, AS RECORDED IN PLAT BOOK 157, AT PAGE 60, OF THE PUBLIC RECORDS OF MIAMI-DADE COUNTY, FLORIDA;

f. One piece of real property located at 192 La Paloma Road, Key Largo, Florida more fully described as Lot 22 in Block 1, of AMENDED

PLAT OF WINSTON WATERWAYS SUB-DIVISON according to the Plat thereof, as recorded in Plat Book 42, at Page 144, of the Public Records of Monroe County, Florida;

g. One piece of real property located at I4914 Southwest 37th Terrace, Miami, Florida more fully described as Lot 19, Block 4, of VILLA SEVILLA, according to the Plat thereof, as recorded in Plat Book 141, at Page 16, of the Public Records of Miami-Dade County, Florida;

h. One 1999 Toyota 4Runner, VIN # JT3GN86 R7X0104519;

i. One 2003 BMW X5, VIN # 5UXFB33533 LH40188;

j. One 2004 GMC Yukon XL, VIN # 3GKEC 16Z34G302364;

k. One 2001 Chevrolet 3500, VIN # 1GCJC 33131F172491;

l. One 2002 Continental Trailer, VIN # 1ZJBE 14162M008424;

m. One 2003 Continental Trailer, VIN # 1ZJBA 31343M014236;

n. One 2003 34' Donzi Vessel, VIN # DNAF 60091203;

o. One 2002 Suzuki Motorcycle GSX1300RK2, VIN # JS1GW71A822101513;

p. One 2001 Toyota Camry, VIN # 4T1BF22 K81U969343;

q. One 2000 Ford Focus, VIN # 1FAFP3438 YW247907;

r. One 2000 Volkswagon Jetta GLS, VIN # 3VWSA29M4YM084580;

s. One 2003 BMW 325i SA, VIN # WBAET 37463NJ33177;

t. All funds on deposit and interest accrued thereto for Bank of America account number 3675540507;

u. All funds on deposit and interest accrued thereto for Bank of America account number 3437194997;

v. All funds on deposit and interest accrued thereto for Bank of America account number 3673304237;

w. All funds on deposit and interest accrued thereto for Bank of America account number 91000045965339;

x. All funds on deposit and interest accrued thereto for Bank of America account number 3439265170;

y. All funds on deposit and interest accrued thereto for Bank of America account number 3677610778;

z. All funds on deposit and interest accrued thereto for Colonial Bank account number 8033462279;

aa. All funds on deposit, funds associated with, and interest accrued thereto for Colonial Bank account number 8032898606;

bb. All funds on deposit and interest accrued thereto for Colonial Bank account number 8032898580;

cc. All funds on deposit and interest accrued thereto for Interamerican Bank account number 450009683;

dd. All funds on deposit and interest accrued thereto for Interamerican Bank account number 450009139;

ee. All funds on deposit and interest accrued thereto for First Union National Bank account number 13122051183837;

ff. All funds on deposit and interest accrued thereto for First Union National Bank account number 33120270206186;

gg. All funds on deposit and interest accrued thereto for First Union National Bank account number 9983798061; and

hh. All funds on deposit and interest accrued thereto for Washington Mutual Bank account number 39300004505691.

4. Pursuant to Title 31, United States Code, Section 5317(c)(1)(A), upon conviction of ISABEL GUERRA, CARLOS GONZALEZ, ISABEL CANEPA, and ISABEL SANTOS for any of the offenses charged in Count 33 of this Indictment, any of the defendants shall forfeit to the United States all property, real and personal involved in such offense, and any property traceable thereto, including but not limited to the following:

a. One piece of real property located at 3924 Southwest 150th Court, Miami, Florida more fully described as LOT 15, IN BLOCK 2, OF KAYLA'S PLACE, ACCORDING TO THE PLAT THEREOF, AS RECORDED IN PLAT BOOK 157, AT PAGE 60, OF THE PUBLIC

RECORDS OF MIAMI-DADE COUNTY, FLORIDA;

b. One piece of real property located at 192 La Paloma Road, Key Largo, Florida more fully described as Lot 22 in Block 1, of AMENDED PLAT OF WINSTON WATER-WAYS SUBDIVISON according to the Plat thereof, as recorded in Plat Book 42, at Page 144, of the Public Records of Monroe County, Florida;

c. One piece of real property located at 14914 Southwest 37th Terrace, Miami, Florida more fully described as Lot 19, Block 4, of VILLA SEVILLA, according to the Plat thereof, as recorded in Plat Book 141, at Page 16, of the Public Records of Miami-Dade County, Florida;

d. One piece of real property located at 10150 Northwest 133rd Street, Miami, Florida more fully described as East 165' of the West 660' of Tract 11, less North 30' thereof, Section 29, Township 52 South, Range 40 East, of FLORIDA FRUIT LAND COMPANY'S SUB-DIVISION, according to the Plat thereof as recorded in Plat Book 2, at Page 17, of the Public Records of Miami-Dade County, Florida;

e. One 1999 Toyota 4Runner, VIN # JT3GN86 R7X0I04519;

f. One 2003 BMW X5, VIN # 5UXFB33533 LH40188;

g. One 2004 GMC Yukon XL, VIN # 3GKEC16 Z34G302364;

h. One 2001 Chevrolet 3500, VIN # 1GCJC3 3131F172491;

i. One 2002 Continental Trailer, VIN # ZJBE 14162M008424;

j. One 2003 Continental Trailer, VIN # 1ZJBA 31343M014236;

k. One 2003 34' Donzi Vessel, VIN # DNAF 60091203;

l. One 2002 Suzuki Motorcycle GSX1300RK2, VIN # JSIGW71A822101513;

m. One 2003 BMW 325i SA, VIN # WBAET 37463NJ33177;

n. All funds on deposit and interest accrued thereto for Bank of America account number 3675540507;

o. All funds on deposit and interest accrued thereto for Bank of America account number 3437I94997;

p. All funds on deposit and interest accrued thereto for Bank of America account number 3673304237;

q. All funds on deposit and interest accrued thereto for Bank of America account number 91000045965339;

r. All funds on deposit and interest accrued thereto for Bank of America account number 3439265170;

s. All funds on deposit and interest accrued thereto for Bank of America account number 3677610778;

t. All funds on deposit and interest accrued thereto for Colonial Bank account number 8033462279;

u. All funds on deposit, funds associated with, and interest accrued thereto for Colonial Bank account number 8032898606;

v. All funds on deposit and interest accrued thereto for Colonial Bank account number 8032896576;

w. All funds on deposit and interest accrued thereto for Colonial Bank account number 8032898580;

x. All funds on deposit and interest accrued thereto for Interamerican Bank account number 450009683;

y. All funds on deposit and interest accrued thereto for Interamerican Bank account number 450009139;

z. All funds on deposit and interest accrued thereto for First Union National Bank account number 13122051183837;

aa. All funds on deposit and interest accrued thereto for First Union National Bank account number 33120270206186;

bb. All funds on deposit and interest accrued thereto for First Union National Bank account number 3271I0637;

cc. All funds on deposit and interest accrued thereto for First Union National Bank account number 9983798061; and

dd. All funds on deposit and interest accrued thereto for Washington Mutual Bank account number 39300004505691.

5. If the property described above as being subject to forfeiture, as a result of any act or omission of ISABEL GUERRA, CARLOS GONZALEZ, ISABEL CANEPA, PURA MEDINA, and ISABEL SANTOS,

(a) cannot be located upon the exercise of due diligence;

(b) has been transferred or sold to or deposited with a third person;

(c) has been placed beyond the jurisdiction of the Court;

(d) has been substantially diminished in value; or

(e) has been commingled with other property which cannot be subdivided without difficulty;

it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p), as made applicable through Title 18, United States Code, Section 982(b)(1), to seek forfeiture of any other property of ISABEL GUERRA, CARLOS GONZALEZ, ISABEL CANEPA, PURA MEDINA, and ISABEL SANTOS, up to the value of the above forfeitable property.

All pursuant to Title 18, United States Code, Sections 982(a)(1) and (a)(7), and the procedures set forth at Title 21, United States Code, Section 853, as made applicable through Title 18, United States Code, Section 982(b)(1) and Title 31, United States Code, Section 5317(c)(1)(A).

A TRUE BILL

/s/ [Illegible]
Foreperson

/s/ [Illegible]
Marcos Daniel Jimenez
United States Attorney

/s/ Luis Perez
Luis Perez
Assistant United States Attorney

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

[Filed 08/29/2005]

Case Number: 05-20144-CR-HUCK
USM Number: 65675-004

UNITED STATES OF AMERICA,

v.

ISABEL GUERRA.

JUDGMENT IN A CRIMINAL CASE

The defendant was found guilty on Count(s) 1, 2, 4, 6, 7, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 24, 27 and 28 of the Indictment.

The defendant is adjudicated guilty of the following offense(s):

Title/Section Number	Nature of Offense	Offense Ended	Count
18 U.S.C. § 371	Conspiracy to commit offenses against the United States to wit: health care fraud.	April 2003	1

Title/Section Number	Nature of Offense	Offense Ended	Count
18 U.S.C. § 1347	Health care fraud	April 2003	2, 4, 6, 7, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19 and 20
18 U.S.C. § 1956(h)	Conspiracy to commit money laundering	April 2003	21
18 U.S.C. § 1956 (a)(1)(B)(1)	Money Laundering	April 2003	24, 27 and 28

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material changes in economic circumstances.

Date of Imposition of Sentence:
8/24/2005

/s/ PAUL C. HUCK
PAUL C. HUCK
United States District Judge

August 25, 2005

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 99 Months. This terms consists of 60 Months as to Count 1, 99 Months as to Counts 2, 4, 6, 7, 9, 10, 11, 12, 3, 15, 16, 17, 18, 19 and 20 and 99 Months as to Counts 21, 24, 27 and 28, all to be served concurrently.

The Court makes the following recommendations to the Bureau of Prisons:

1. The defendant be designated to a facility as close to South Florida as possible.
2. The Court has no objection to the Defendant participating in a drug/alcohol treatment program, if it is determined after the defendant is evaluated that she is eligible to participate in such program.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at_____, with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By:_____

Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years as to Counts 1, 2, 4, 6, 7, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 24, 27 and 28, to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;

2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4. The defendant shall support his or her dependents and meet other family responsibilities;

5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6. The defendant shall notify the probation officer at least ten (10) days prior to any change in residence or employment;

7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere

and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. The defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

The defendant shall perform 250 hours per year of community service over the period of supervision on a pro-rata basis, as directed by the United States Probation Officer.

The defendant shall not apply for, solicit, or incur, any further debt, included but not limited to, loans, lines of credit, or credit card charges, either as a principal or cosigner, as an individual or through any corporate entity, without first obtaining permission from the U.S. Probation Officer.

The defendant shall provide complete access to financial information, including disclosure of all business and personal finances, to the U.S. Probation Officer.

The defendant shall maintain full-time, legitimate employment and not be unemployed for a term of more than 30 days, unless excused by the U.S. Probation Officer. Further, the defendant shall provide documentation, including but not limited to, pay stubs, contractual agreements, W-2 Wage and Earnings Statements, and any other documents requested by the U.S. Probation Office.

The defendant shall obtain prior written approval from the U.S. Probation Officer before entering into any self-employment.

The defendant shall not own, operate, act as a consultant, be employed in, or participate in the health care industry during the period of supervision.

The defendant shall submit to a search of his person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments.

Total Assessment	Total Fine	Total Restitution
$2,000.00	$125,000.00	$

It is further ordered that the defendant shall pay a fine in the amount of $125,000.00. During the period of incarceration, payment shall be made as follows: (1) if the defendant earns wages in a Federal Prison Industries (UNICOR) job, then the defendant must pay one-third of wages earned toward the financial obligations imposed by this Judgment in a Criminal Case. These payments do not preclude the government from using other assets or income of the defendant to satisfy the fine obligations.

Upon release of incarceration, the defendant shall pay restitution at the rate of 25% of monthly gross earnings, until such time as the court may alter that payment schedule in the interests of justice. The U.S. Bureau of Prisons, U.S. Probation Office and U.S. Attorney's Office shall monitor the payment of the fine and report to the court any material change in the defendant's ability to pay.

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A. Lump sum payment of $127,000.00 due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed. The assessment/fine/restitution is payable to the U.S. COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
301 N. MIAMI AVENUE, ROOM 150
MIAMI, FLORIDA 33128

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

The defendant shall forfeit the defendant's interest in the following property to the United States:

> Pursuant to the Preliminary Order and Judgment of Forfeiture entered on June 17, 2005.

The defendant's right, title and interest to the property identified in the preliminary order of forfeiture, which has been entered by the Court and is incorporated by reference herein, is hereby forfeited.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Filed Feb. 22, 2008]

Case No: 05-20144-CR-HUCK

UNITED STATES OF AMERICA,
Plaintiff,

v.

ISABEL GUERRA,
Defendant.

NOTICE OF APPEAL

NOTICE IS HEREBY given, pursuant to Rule 4(b) of the Federal Rules of Appellate Procedure, and 18 U.S.C. § 3742, that ISABEL GUERRA, Defendant in the above-styled case, hereby appeals to the United States Court of Appeals for the Eleventh Circuit from the sentence entered herein on February 13, 2008, including the final order of forfeiture entered by the Court.

Respectfully submitted,

/s/ J.C. Codias

J.C. Codias, Esq.
Bar No: 0471577
The Four Ambassadors
825 Brickell Bay Dr. #1243
Miami, Fla. 33131
Phone (305) 372-8875
Fax (305) 372-2745

APPENDIX D

SOUTHERN DISTRICT OF FLORIDA

[Filed Nov 16 2005]

Case No. 05-20144-CR-HUCK

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ISABEL GUERRA, *et al.*,
Defendant(s)

FINAL ORDER AND JUDGMENT OF FORFEITURE

THIS CAUSE is before the court upon motion of the United States for entry of a Final Order and Judgment of Forfeiture. Being fully advised in the premises, the Court finds as follows:

1. On June 17, 2005, this Court entered a Preliminary Order and Judgment of Forfeiture [DE #197], condemning and forfeiting the interest of defendant ISABEL GUERRA (hereinafter referred to as "defendant") in the following property to the United States of America pursuant to 18 U.S.C. § 982(a)(7) and 21 U.S.C. § 853.

a. A money judgment in the amount of $9,405,114.90 in United States currency;

b. One piece of real property located at 192 La-Paloma Road, Key Largo, Florida, more fully described as Lot 22 in Block 1, of AMENDED PLAT OF WINSTON WATERWAYS SUBDI-

VISION according to the Plat thereof, as recorded in Plat Book 42, at page 144, of the public records of Monroe County, Florida;

c. One 2004 GMC Yukon XL, VIN 3GKEC16 Z34G302364;

d. One 2001 Chevrolet 3500, VIN 1GCJC331 31F172491;

e. One 2002 Continental Trailer, VIN 1ZJBE141 62M008424;

f. One 2003 Continental Trailer, VIN 1ZJBA313 43M014236;

g. One 2003 34' Donzi Vessel, VIN DNAF600 91203;

h. One 2002 Suzuki Motorcycle GSX130ORK2, VIN JS1GW71A822101513;

i. All funds on deposit and interest accrued thereto for Bank of America Account No. 3673304237;

j. All funds on deposit and interest accrued thereto for Bank of America Account No. 3677610778;

k. All funds on deposit and interest accrued thereto for Bank of America Account No. 91000045965339;

l. All funds on deposit and interest accrued thereto for Colonial Bank Account No. 8032898606;

m. All funds on deposit and interest accrued thereto for Interamerican Bank Account No. 450009683;

n. All funds on deposit and interest accrued thereto for Interamerican Bank Account No. 450009139;

o. All funds on deposit and interest accrued thereto for First Union National Bank Account No. 13122051183837;

p. All funds on deposit and interest accrued thereto for First Union National Bank Account No. 33120270206186;

q. All funds on deposit and interest accrued thereto for First Union National Bank Account No. 9983798061; and

r. All funds on deposit and interest accrued thereto for Washington Mutual Bank Account No. 39300004505691;

s. A money judgment in the amount of $248,500.00 representing checks from Ocean Medical's First Union National Bank Account No. 9983798061 to Panorama Medico and Florida Advertising Group; and

t. A money judgment in the amount of $450,051.00 representing checks form United Pharmacy Discount's First Union National Bank Account No. 2000006265339 to Panorama Medico and Florida Advertising Group.

2. On September 14, 2005, the United States published notice of this forfeiture, the intent of the United States to dispose of the property in accordance with the law, and notice to all third parties of their right to petition the Court within thirty (30) days for a hearing to adjudicate the validity of their alleged legal interest in the property, in a newspaper of general circulation, The Miami Daily Business Re-

view. The Proof of Publication was filed with this Court on September 23, 2005. [DE # 266]

3. On September 29, 2005, third party petitioners Isabel Guerra, personally and on behalf of her minor daughter Vanessa Isabel Rodriquez, Mrs. Isabel Santos and Mr. Juan Paula timely filed claims as to their alleged respective interests in the following assets:

a. One piece of real property located at 192 La-Paloma Road, Key Largo, Florida, more fully described as Lot 22 in Block 1, of AMENDED PLAT OF WINSTON WATERWAYS SUBDIVISION according to the Plat thereof, as recorded in Plat Book 42, at page 144, of the public records of Monroe County, Florida;

b. One 2004 GMC Yukon XL, VIN 3GKEC16 Z34G302364;

c. One 2001 Chevrolet 3500, VIN 1GCJC331 31F172491;

d. One 2003 34' Donzi Vessel, VIN DNAF600 91203;

e. One 2002 Suzuki Motorcycle GSX1300RK2, VIN JS1GW71A822101513;

f. All funds on deposit and interest accrued thereto for Bank of America Account No. 3673304237;

g. All funds on deposit and interest accrued thereto for Bank of America Account No. 91000045965339;

h. All funds on deposit and interest accrued thereto for Interamerican Bank Account No. 450009683;

i. All funds on deposit and interest accrued thereto for First Union National Bank Account No. 9983798061; and

4. On October 20, 2005, Juan Paula filed an untimely claim with respect to his alleged interest in bank account 39300004505691 at Washington Mutual Bank.

ORDERED AND ADJUDGED:

1. That the right, title, claim and interest in the following property:

a. A money judgment in the amount of $9,405,114.90 in United States currency;

b. One 2002 Continental Trailer, VIN 1ZJBE14 162M008424;

c. One 2003 Continental Trailer, VIN 1ZJBA313 43M014236;

d. All funds on deposit and interest accrued thereto for Bank of America Account No. 910000 45965339;

e. All funds on deposit and interest accrued thereto for Colonial Bank Account No. 8032 898606;

f. All funds on deposit and interest accrued thereto for Interamerican Bamk Account No. 450009139;

g. All funds on deposit and interest accrued thereto for First Union National Bank Account No. 13122051183837;

h. All funds on deposit and interest accrued thereto for First Union National Bank Account No. 33120270206186; and

i. All funds on deposit and interest accrued thereto for Washington Mutual Bank Account No. 39300004505691;

j. A money judgment in the amount of $248,500.00 representing checks from Ocean Medical's First Union National Bank Account No. 9983798061 to Panorama Medico and Florida Advertising Group; and

k. A money judgment in the amount of $450,051.00 representing checks form United Pharmacy Discount's First Union National Bank Account No. 2000006265339 to Panorama Medico and Florida Advertising Group,

are hereby forfeited to and clear title vested in the United States.

2. That the United States Marshals Service shall dispose of the property identified in the Preliminary Order of Forfeiture in this action, as further identified in paragraph (1) above, in accordance with the law.

3. This Court shall retain jurisdiction of this case to enforce the terms of the plea agreements and the final order of forfeiture.

4. The Clerk is hereby directed to send copies of this Order to all counsel of record. DONE AND ORDERED at Miami, Florida this 16th day of November 2005.

/s/ Paul C. Huck
Paul C. Huck
UNITED STATES DISTRICT JUDGE

cc: AUSA Jonathan Loo (3 certified copies)
AUSA Luis Perez
J.C. Codias, Esquire
825 Brickell Bay Drive
Miami, FL 33131

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 05-20144-CR-HUCK

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ISABEL GUERRA,
Defendant.

ORDER VACATING FINAL ORDER AND JUDGMENT OF FORFEITURE

THIS MATTER is before the Court sua sponte. On November 16, 2005 this Court entered a Final Order and Judgment of Forfeiture. Claimants filed a Response Opposing Government's Motion for Entry of Final Order of Forfeiture on November 17, 2005. Therefore, it is

ORDERED and ADJUDGED that the Final Order and judgment of Forfeiture dated November 16, 2005 (D.E. # 308) is VACATED. A hearing on the Government's Motion for Entry of Final Order and Judgment of Forfeiture will take place during the bench trial on the forfeiture issues during the two-week period beginning. December 19, 2005.

DONE and ORDERED in Chambers at Miami, Florida this 28 day of November 2005.

/s/ Paul C. Huck
Paul C. Huck
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Jonathan Loo, AUSA
Luis M. Perez, AUSA
J.C. Codias, Esq.

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH JUDICIAL CIRCUIT

Appeal No: 05-14864-A

ISABEL GUERRA,
Defendant-Appellant,

v.

UNITED STATES OF AMERICA,
Plaintiff-Appellee

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF FLORIDA

INITIAL BRIEF OF APPELLANT

STATEMENT OF THE ISSUES

I. Whether the lower court had the authority to make factual findings by a preponderance of the evidence at sentence, other than the fact of a prior conviction, of facts that were neither admitted by the defendant nor proven to the jury which increased the penalty for a crime beyond the prescribed statutory maximum, resulting in a mandatory sentence under the sentencing guidelines, or whether these facts must have been submitted to the jury, and proven beyond a reasonable doubt, that is, whether all facts legally essential to the punishment must have been

resolved by the trial jury, pursuant to Supreme Court rulings in the *Booker* and *Fanfan* cases as well as this Court's own rulings on the subject

II. Whether there was insufficient evidence to convict appellant Isabel Guerra of having committed Medicare fraud or money laundering and whether losses suffered by the alleged victim in a fraud case are required by the sentencing guidelines under USSG § 2B 1.17

III. Whether there were multiple agreements or conspiracies in this case as well as different prosecutorial theories in mid-trial resulting in fatal variances which requires acquittal of the charges, and whether the forfeiture of real and personal property of Isabel Guerra in this case was unlawful as it was not based on any evidence that the proceeds reflecting these assets were derived from Medicare fraud which were traceable to the commission of the Medicare offense, as required by 18 USC §982 (a)(7)?

* * * *

their initials only. The lower court dismissed four (4) of these counts leaving 15 claims as counts. (R.doc. #162 pp.198-199) Count 21 charged Isabel Guerra with money laundering based on her payments to the government informant for advertising. Counts 22 to 32, of the indictment identified three (3) checks from Ocean Medical issued by Isabel Guerra to the informant, and eight (8) checks from United Pharmacy issued to the informant by the other shareholder of United Pharmacy, codefendant Carlos Gonzalez.

It is the position of appellant Isabel Guerra in this appeal that alleged Medicare fraud results from the transactions between her company Ocean Medical, and/or her 50% share of United Pharmacy, and the

Medicare program, and not her transactions with a private third party involving advertising payments, the government informant's company in this case.

The 19 Medicare Fraud Counts. Isabel Guerra was charged with 19 identifiable charges of Medicare fraud which were the actual 19 counts in the indictment, later reduced to 15; nine (9) of these counts were against codefendant Carlos Gonzalez at United Pharmacy based on the government lists provided in discovery, and six (6) counts were against Isabel Guerra at Ocean Medical. The 15 health care fraud counts in the indictment amounted to $15,820. The six (6) counts imputed to Isabel Guerra at Ocean Medical, namely, counts 2, 4, 7, 12, 15, and 16, were all prescriptions from a Dr. Pedro Cuni. The total amount of the six (6) Ocean Medical counts was $7,000. (R. doc. #229 p.9)

The government prepared lists of the actual patients these representatives had referred to codefendant Carlos Gonzalez at United Pharmacy. (R.E. #11) As will be shown all three patient representatives testified at trial that the patients referred to codefendant Carlos Gonzalez at United Pharmacy were all legitimate Medicare beneficiaries; with legitimate prescriptions from their own doctors; and that every single patient actually received the medication dispensed by United Pharmacy. These lists were specific and contained the names or Medicare numbers of the Medicare patients referred to codefendant Carlos Gonzalez.

The remaining six (6) counts, namely, counts 2, 4, 7, 12, 15, and 16, were imputed to Isabel Guerra at Ocean Medical, and they were all prescriptions from a Dr. Pedro Cuni. The total amount of the six (6) Ocean counts was $7,000. By way of discovery pre-

trial, the government provided three (3) pages containing about 126 HICN numbers of patients under the heading "Dr. Pedro Cuni referring physician at Ocean Medical Supplies". These patients were not identified by either names or initials. The government also provided six (6) pages containing about 256 HICN numbers under the heading "Dr. Pedro Cuni claims for portable oxygen tanks". (R.E. #10)

In his sworn deposition of July 21, 2004, Dr. Pedro Cum testified that he regularly prescribed breathing medication for his elderly Medicare patients and that although sometimes the chart or prescription did not have his own handwriting on it, it was common practice for other employees of the clinic, like nurses or Physician Assistants, who actually see the patients and completed the patient charts and prescriptions in their own handwriting according to the patient's medical needs. (R.E. #12)

Further, that all medications welt properly ordered pursuant to the physicians' Monthly Prescribing Reference book, and that he never allowed anyone to tell him the proper medication to be dispensed, and that whenever questions came up, Medicare personnel were unable to answer his specific questions. Also, Dr. Cuni would prescribe orthotic devices for his elderly patients according to their medical needs. (R.E. #12) The government chose not to bring Dr. Pedro Cuni as a government witness in the trial of Isabel Guerra.

However, it turned out that the six (6) patients mentioned in these six (6) counts of the indictment were introduced by the government only to corroborate that Dr. Pedro Cuni was indeed a medical doctor whose prescriptions had been sometimes serviced at Ocean Medical and not that any Medicare fraud was

associated with any of these patients. (R. doc. #162 p.29) Dr. Pedro Cuni was not brought by the government to testify in this case and not one single identifiable claim to the Medicare program was introduced at trial in relation to any of these patients.

Not a single Medicare patient testified in this case as to any health care fraud in relation to any of the listed counts in the indictment as to whether or not they had the medical necessity for the prescribed items; or as to whether or not they had received the prescribed items in due course; or as to whether or not they had been economically induced by Isabel Guerra to receive services from either Ocean Medical or from United Pharmacy.

Not a single medical doctor was brought to testify in support of any allegation of Medicare fraud in relation to any of these patients; and no witness from the Medicare program testified in support of any "losses" caused by Isabel Guerra to the Medicare program thru her operation of Ocean Medical and/or her 50% ownership of United Pharmacy, except for Medicare fraud and abuse expert Ms. Tanya Moore that testified that in this case the Medicare program had not lost any monies whatsoever by the conduct of Isabel Guerra, as will be shown.

Three of the patients of Isabel Guerra listed in the indictment had already died by the time of trial however, the remaining four (4) patients; Maria Gonzalez, count 7 of the indictment; Clara Gonzalez, count 12 of the indictment; Alberto Diaz, count 15 of the indictment, and Alicia Hernandez, count 16 of the indictment, all provided sworn affidavits indicating they had actually received the prescribed orthotics as ordered by their doctors for their medical condition, and that they were never paid any monies what-

soever by Isabel Guerra or anyone else at Ocean Medical. The government did not contest any of these affidavits nor did it subpoena any of these Medicare patients to testify at trial nor at sentence. (R.doc. #207, pp.5-10) (R.E. #12)

By way of written discovery a few lists were provided reflecting names of legitimate Medicare patients that patient representatives Jorge Luis Santos (JLS) and Tony Hevia (Hevia) had referred to Carlos Gonzalez at United Pharmacy. (RE. #11) (R.doc. #207. There were no lists of any legitimate Medicare beneficiary ever having been referred to Isabel Guerra by a commissioned patient representative, either at Ocean Medical or at her 50% portion of United Pharmacy.

The government tried to introduce these lists of claims as part of its case in chief, however, the trial court ruled that these lists were to remote or tenuous to constitute, in and of themselves, instances of Medicare fraud, and that evidence of fraud was going to be needed to be introduced by the government, at which time the government then changed its prosecutorial theory mid-trial and advised the lower court that it wanted these lists introduced for purposes of "corroboration only". (R.doc. #162 p.29)

After the trial it was determined after trying to match the HICN numbers of patients used for corroboration purposes only, with the names of the patients, that counts 2, 4, 7, 12, 15, and 16, imputed to Isabel Guerra at Ocean Medical, had all been introduced for purposes of corroboration only. Isabel Guerra was convicted of counts that were introduced for corroboration purposes only and not as evidence of any Medicare fraud.

Upon learning of the identities of these specific patients, a motion for a new trial was filed with the lower court. The lower court was apprized that the pretrial nondisclosure of this exonerating evidence was a violation of the rules of discovery and that the evidence presented at trial was not sufficient to support the conviction, and also that there had been a material variance between the indictment and the evidence presented at trial. (R.doc. #192) The motion was denied by the lower court. (R.doc. #204)

Pretrial proceedings. Upon being indicted Isabel Guerra advised the lower court that it did not admit any of the amounts being imputed as losses as a result of Medicare fraud and moved the lower court for an order to have any amounts alleged as fraud to be proven to the jury beyond a reasonable doubt, because this was not a judicial function in her case, but rather the function of the jury. (R. doc. #109)

Isabel Guerra did not waive her Booker, Apprendi and Blakely rights to have a jury decide the amounts of losses which would have determined the sentence in this case, and so advised the lower court in open court. (R.doc. #109) The government opposed this request although constitutionally required. (R.doc. #110). The lower court denied the motion. (R.doc #117) Isabel Guerra then filed a Bill of Particulars based on Apprendi and Blakely asking to know what were the amounts of alleged losses the government was alleging had been caused to the Medicare program by Isabel Guerra, so she could prepare to meet these allegations at trial, since the indictment only mentioned a few patients with alleged losses amounting to a few thousand dollars. (R.doc. #53) The lower court denied the motion. (R. doc. #81)

In its discovery in the criminal case by way of a CD containing about 320,000 entries applying to several different entities, some not even listed in the indictment, the government included the identification numbers of 25 patients from its prospective witness Dr. Goldstraj as instances where Ms. Guerra had committed Medicare fraud by simply adding the names of these 25 patients in one of its "lists". Isabel Gump timely sought production of the actual 25 patient charts. Isabel Guerra wanted to introduce these patient charts into evidence to prove that there had been no Medicare fraud whatsoever in reference to these 25 patients. (R.doc. #124)

On May 4, 2005, the lower court ruled that if the government did not have the requested documents, the defendant could subpoena the documents directly from Dr. Goldstraj. On May 6, 2005, a documentary subpoena was served on government witness Dr. Goldstraj requesting copies of the needed patient files giving a deadline of May 12, 2005, in view of the forthcoming jury trial. (R.doc. #124)

Inexplicably, the government opposed this request of its own evidence which allegedly would have proven Medicare fraud on the part of Isabel Guerra, stating that Dr. Goldstraj did not have these patient charts since he was only an employee of the different clinics he worked at, and as such he did not have any obligation to keep copies of these patient charts, although the lower court was provided the Florida Statute which orders medical doctors to keep their patient charts for a period of five (5) years. (R.doc. #124) The lower court denied the motion. (R.doc. #152)

From amongst thousands of orders received by Ocean Medical over the years, there were 22 claims from different doctors where the government claimed

an erroneous UPIN (Unique Physician Identification Number) number was used by Ocean Medical to bill Medicare for services provided, resulting in different doctors being listed as the prescribing physician instead of the local doctors who ordered the equipment. Isabel Guerra denied this incoherent allegation and repeatedly asked the government to identify what specific patients and specific claims it was referring to, and who where the actual 22 Medicare patients in order to rebut this false allegation. (R.E. #15)

Again, inexplicably, the government opposed this request for specific information and the lower court denied Isabel Guerra's request in open court. As it turned out, none of these alleged claims made it to trial, and no evidence whatsoever was introduced by the government in reference to any of these 22 claims listed in its own discovery in one of the "lists" of patients it claimed Medicare fraud had been committed by Isabel Guerra.

Since the advertising payments to the government informant were the only instance of misconduct by Isabel Guerra; and since these payments had nothing t9 do with the alleged Medicare fraud and served only the purpose of destroying the presumption of innocence of Isabel Guerra at trial in the unrelated Medicare fraud charges, thereby creating the real risk that Isabel Guerra could be found guilty because of unrelated misconduct; Isabel Guerra moved the lower court for a severance of the alleged health care fraud and money laundering counts. (R.doc. #55) The lower court denied the motion. (R.doc. #67)

Trial proceedings. The first witness produced by the government was a jail house witness named Ruben Martinez, who pleaded guilty in an unrelated Medicare case usec to own a pharmacy, and was con-

victed of health care fraud along with his entire family whom were all also convicted of health care fraud. Martinez was trying to get sentence reductions for himself and his other family members for testifying at different trials. (R.doc. #157, pp.47-51) Martinez admitted that he hoped to get benefits for any kind of cooperation for testifying against anyone the government wanted him to testify against based on what the government needed, (pp.59-60) because he knew when he plead guilty that he had to cooperate with whatever the government asked him, (p.28) and also, that everything he did was based on his knowledge of the federal sentencing guidelines. (54)

Martinez never went to United Pharmacy although he knew codefendant Carlos Gonzalez personally and had socialized with him; and that federal agents had taken all his records, computers and personal documents from his pharmacy in 2002. (pp.29-31), and that he knew Carlos Gonzalez for several years from before 2000, because Mr. Gonzalez owned a medical supply company with about 70 to 80 patients. (R.doc. #156, p.36, 41) Martinez became angry at Carlos Gonzalez because Carlos Gonzalez wanted to take business away from him when Gonzalez opened his own pharmacy (United Pharmacy) (pp.27, 29), because Carlos Gonzalez gave the patient recruiters a better deal so that they would go with Mr. Gonzalez. (p.60) No such statement was made as to Isabel Guerra. (*see* entire docs 156-157)

Martinez also testified that everything at his pharmacy was legal except the aerosol medication, (R.doc. #156, p.33) and that lie had a patient file for each patient serviced by his pharmacy (p.34). Also, that the referred beneficiaries were all legitimate Medicare patients and the prescription was always

dispensed as ordered by the patients' physician. (pp.42, 51) Martinez then stated that Isabel Guerra and Mr. Gonzalez worked separately, (p.41) and that Ms. Guerra also brought a few prescriptions to his pharmacy in the year 2000, and had received a commission from Martinez. (p.41) However, Martinez was silent as to whether any of these alleged prescriptions were for aerosol medication.

When asked for the full name of Isabel Guerra, and to identify Isabel Guerra at trial, Martinez seemed confused. (R.doc. #156, pp.45-47; doc. #157, p.27) Martinez also testified that he had computerized records of all his patient recruiters and the names of all the alleged patients referred, and that all the information was in his computers. He also stated that he had assigned "codes" and not the real names to each of his recruiters, and therefore he could simply say that any one "code" represented any person he wanted to assign the "code" to, and that all that information was in the computer. (pp.53-55)

When asked to produce the computer printout of names of the alleged patients referred by Isabel Guerra to him in the year 2000, he stated that he did not have them. (pp.55). When asked to produce the names of the alleged patients referred by Isabel Guerra for aerosol medication in the year 2000, again he stated that he did not have them. (p.57) Martinez acknowledged that every time a patient is serviced by a pharmacy that a patient chart is created by that pharmacy with all the information about the patient, including the delivery receipts of the medication dispensed by the pharmacy, but when asked to produce such patient charts for the jury's review, the witness indicated that he could not bring them because all

those patient charts were at the pharmacy. (R.doc. #157, p.21)

The government objected by saying that Martinez could not get copies of these patient charts because he was in jail, but was overruled. The evidence showed that Martinez had known since December of 2004, that he was going to be testifying at this trial and had had ample time to produce these copies, (p.21-22) and had previously testified that federal agents had taken all his records, computers, and personal documents from his pharmacy in 2002. (pp.29-31). Martinez admitted that while incarcerated at FDC he had access to his family members; to his attorneys, and to his attorney's investigators, and as such could get information on other cases. (R.doc. #157, pp.22-23) Martinez also had an employee by the name of Cecilia Rodriguez, who actually worked at the pharmacy's computer, and whom later on opened her own pharmacy. (R.doc. #156, pp.43-44) The government did not produce one single item of evidence about this allegation of Martinez although supposedly in possession of all the records of Martinez's pharmacy.

This left Isabel Guerra unable to defend against these false, anonymous and ambiguous hearsay statements of Martinez, because had any actual prescriptions for aerosol medication been identified, Isabel Guerra would have been able to subpoena the actual beneficiaries and/or the actual prescribing physicians to disprove this false allegation. The next witness was FBI S/A Janel Lobur. Lobur testified that United Pharmacy had been incorporated on January 25, 2000. This was the same year that Martinez claimed Isabel Guerra had referred some aerosol patients to his pharmacy. Also, that Ocean Medical

was incorporated on May 26, 1995, about five (5) years before Martinez alleged Isabel Guerra referred some aerosol patients to him. (R.doc. #157, pp.15, 17)

Witness Chuck Schaming, manager of investigations for Palmetto GBA, an intermediary insurance company, testified that in the Medicare carrier's manual there was a difference between health care fraud and health care abuse, and that the intermediary insurance company could investigate and audit any DME at any time, and could also talk directly to the beneficiaries, and check each and every claim and invoice associated with each claim submitted by any DME. (R.doc. #157 pp.96-101)

Witness Cecilia Rodriguez, worked for Ruben Martinez at his pharmacy, Lolita's pharmacy, since November 1997, and had known Martinez for about 25 years. Rodriguez was the pharmacy technician and in charge of inputting all the information into Martinez's pharmacy computers. She was trained to do compounding whenever it was needed, which was perfectly legal, and she also personally knew all the many patient recruiters that Martinez had because they would personally bring the prescriptions directly to her. One of these recruiters was codefendant Carlos Gonzalez. Rodriguez did not remember the actual dates when Gonzalez referred patients to Lolita's pharmacy (Martinez's pharmacy), because by that time Gonzalez already had his own pharmacy and Gonzalez took his patients with him.

Later, she referred a couple of patients to Carlos Gonzalez at United Pharmacy. Carlos Gonzalez paid Cecilia Rodriguez a few checks from United Pharmacy signed by Carlos Gonzalez. Cecilia Rodriguez had an arrangement with Carlos Gonzalez to receive a commission from Carlos Gonzalez every time she

referred a patient to Carlos Gonzalez at United Pharmacy. She also knew many recruiters including one Tony Hevia and one Jorge Luis Santos. Tony Hevia told Cecilia Rodriguez he had a commission arrangement with Carlos Gonzalez at United Pharmacy. (R.doc. #157 pp.106-121)

Cecilia Rodriguez also met Pura Medina, the assistant to Carlos Gonzalez at Lolita's, and later worked at United Pharmacy herself along with Pura Medina and Carlos Gonzalez for a brief period. Rodriguez gave Gonzalez information for Gonzalez to obtain chemicals to start compounding at United Pharmacy. (R.doc. #157 p.125) As soon as Rodriguez opened her own pharmacy, she stopped referring patients to Carlos Gonzalez. (R.doc. #158, p.6) Rodriguez, who was testifying in exchange for possible favors from the government, did not once mention Isabel Guerra as ever having been a recruiter for Martinez's pharmacy; nor being in Lolita's pharmacy's computers; nor ever bringing one single aerosol prescription to her at Lolita's pharmacy: nor of her having any arrangement whatsoever with Isabel Guerra at Martinez's pharmacy.

Rodriguez did not have any commission arrangement with Isabel Guerra at United Pharmacy, nor did she ever refer any patients to Isabel Guerra at United Pharmacy; nor was she ever paid one cent from Isabel Guerra at United Pharmacy. Rodriguez acknowledged that all prescriptions were legitimate; from legitimate doctors, and that in every case the medication was actually dispensed to the Medicate patient. (R. doc. #157, pp.129-131) Not one single prescription was identified nor introduced into evidence as being the subject matter of any fraud whatsoever in reference to Isabel Guerra. No evidence of

any losses to the Medicare program caused by Isabel Guerra were introduced to the trial jury for their determination of "losses" beyond a reasonable doubt.

Witness Miguel Ugarte, a licensed orthotist, testified that he did measurements for patients and actually was licensed to sell the orthotics at his company, AA Orthopedics. That he had several employees, one of them licensed to do measurements. That he would get paid for his work from Medicare as well as from private insurance companies, and that he charged $25 for each measurement. That he had an employment agreement with Ocean Medical, as required by Medicare, from November 2000, to November 2001. Ugarte brought to trial his company's files for services rendered to Ocean Medical's patients. (R.doc. #158, pp.41-52) The measurement forms were usually brought to his company by the different DME's, including Ocean Medical, and would be completed partially by the DME and partially by "one of our employees" at AA Orthopedics. (p.53)

The government introduced four (4) patient files of Ocean Medical were Ugarte stated sometimes he did not personally see the patients, a violation of his agreement with Medicare, that he had entered into a guilty plea and was cooperating with the government. That at some point in time he had so much work that it got out of hand, and he would not go much by his office, leaving his employees to receive the patients needing measurements. (pp.61-63) That since he was not personally at his company, his other employees would receive the patients and perform the measurements, which they were licensed to do. And that the checks from Ocean Medical were for the products it bought for its Medicare patients plus the $25 measurement fee. Ugarte did not remember which

patients he measured personally and which he did not because he was not at his office much, but that he had four other employees, one of them being a licensed orthotic fitter allowed by law to do patient measurements, (p.69-73) and that Ocean Medical always paid his company AA Orthopedics with a check. (p.76)

The agreement Ugarte had with Ocean Medical indicated Ugarte would use his own professional judgement as to the manner in which his services were to be rendered. (p.79-80) The seven (7) checks paid by Ocean Medical to Ugarte for his services during its contract with Ocean Medical turned out to be checks paid by Ocean Medical for the purchase of orthotic devices for its Medicare patients, until Ocean Medical terminated its contract with Ugarte and went to a different fitter, named Smith. (pp.81-86) It turned out that the list of about 135 companies Ugarte was deferring some patient measurements to his employees did not include Ocean Medical Supplies Inc, but rather a different company with a similar name named Oceanic Medical Supplies Inc. (p.88)

Ugarte could not even identify Isabel Guerra at trial, and admitted he remembered some patients being brought in for measurements but that if he was not at his company, he couldn't know how many patients actually went to his company for measurements, and that it was normal and legal practice for the DME to bring the measurement forms partially completed when it brought its patients in for measurements, and that the Medicare patients mentioned at trial brought by Ocean Medical all had their proper documentation in order (pp.90-96). The lower court properly indicated that witness Ugarte was brought to testify just to "give some flavor" to the

trial, which suggests this witness's testimony did not prove any Medicare fraud on the part of Isabel Guerra. (R.doc. #229 p.20)

Witness Hugo Goldstraj was a medical doctor who used to work at many different clinics simultaneously and at each of these clinics he had different Physician Assistants (P.A.'s) who would actually see and examine the patients; complete the patient charts; complete the diagnosis; complete the prescriptions, and actually sign the prescriptions for the different patients, all in their own handwriting, and all with the doctor's authorization. That all the different P.A's at the different clinics had different handwritings and that he could not recognize the different handwritings of all his different P.A.'s, because he was not an expert in handwriting. (R.doc. #158 pp.117-128) And that he personally signed the different prescriptions in different ways with different signatures. (pp.138-139)

Dr. Goldstraj testified that each prescription identified for him to examine at trial belonged to a legitimate patient; that he had no evidence that the medication or orthotic had not in fact been dispensed to the patient as prescribed; that if the medication or orthotic had in fact been dispensed to the patient that such was perfectly legal, regardless of whether he personally signed the prescription, or whether the prescription was signed by one of his P.A.'s or secretaries with his authorization. (pp.140-142) That he never once saw any one of his patients wearing an orthotic device which was not exactly what he had ordered, and that he did not know either Ocean Medical or United Pharmacy. (pp.144-148) The government introduced a few prescriptions worth a few hundred dollars where the doctor said sometimes it

was not his handwriting or his signature; sometimes that he was not sure, and sometimes that it was not his handwriting or signature.

The government identified four (4) prescriptions with patients names on them. (pp.112-114) There was no evidence introduced that any of these (4) patients were patients serviced by Ocean Medical or by the 50% portion of United Pharmacy owned by Isabel Guerra. None of the Medicare patients for whom the prescriptions were written were brought to testify in reference to any impropriety whatsoever with respect to any of the prescriptions mentioned. No evidence of any losses to the Medicare program caused by Isabel Guerra were introduced to the trial jury for their determination of losses beyond a reasonable doubt. The lower court properly indicated that witness Goldstraj was also brought to testify just to "give some flavor" to the trial, suggesting this witness's testimony did not prove any Medicare fraud on the part of Isabel Guerra. (R.doc. #229 p.20)

Witness Jorge Luis Santos testified that he used to own a DME called JLS; that he had pleaded guilty in an unrelated Medicare fraud case and was expecting a sentence reduction. Santos was a personal friend of codefendant Carlos Gonzalez with whom he used to play racquetball, along with another friend named Tony Hevia. Santos needed a pharmacy to refer his oxygen patients to and he entered into a commission agreement with his friend Carlos Gonzalez wherein Santos would receive a commission of 50% of whatever the Medicare payment to Carlos Gonzalez would be. Sometimes Gonzalez would pay him his commission and on some occasions Gonzalez's assistant, Pura Medina, would pay him. (R.doc. #159 pp.6-11)

And that Carlos Gonzalez never spoke to him about his other partner at United Pharmacy (p.13)

That all the Medicare patients referred to Carlos Gonzalez were legitimate beneficiaries; with legitimate prescriptions from their own doctors; and that in every case the medication was actually dispensed to the Medicare patients, and that the only reason he needed a pharmacy for his patients was that Medicare had changed the rules not allowing DME's to provide the medication to their own patients, as it used to be before the change. (pp.13-16) Not one word about Isabel Guerra having any arrangement with Santos; or ever paying Santos anything to refer patients to her; nor was Isabel Guerra even mentioned by this witness, indicating that Isabel Guerra did not even know witness Santos. Again, no evidence whatsoever of any Medicare fraud on the part of Isabel Guerra was introduced thru this witness in reference to Isabel Guerra ever having any commissioned patient representatives, and no evidence of any losses to the Medicare program caused by Isabel Guerra were introduced to the trial jury for their determination of losses beyond a reasonable doubt.

Witness Tony Hevia testified that he had pleaded guilty in an unrelated Medicare fraud case and was expecting a sentence reduction (R.doc. #159 pp.76-77); that he was a personal friend of codefendant Carlos Gonzalez, with whom he used to play racquetball, and that he was introduced to Carlos Gonzalez by Cecilia Rodriguez, as being the owner of United pharmacy, and that he developed a business relationship with Carlos Gonzalez. (pp.45-49) That Carlos Gonzalez signed all the checks given to him as commissions; that sometimes he would be called to pick up his commission payments by Carlos Gonzalez, and

sometimes by Carlos Gonzalez's assistant Pura Medina. (pp.53-58)

That he had been to United Pharmacy many times (p.70), and had referred about 45 patients to Carlos Gonzalez. (p.74) That one time he saw Isabel Guerra at United Pharmacy (p.65) Not one word about Isabel Guerra having any arrangement with Hevia; or ever paying Hevia anything to refer patients to her. Again, no evidence whatsoever of any Medicare fraud on the part of Isabel Guerra was introduced thru this witness in reference to Isabel Guerra ever having any commissioned patient representatives, and no evidence of any losses to the Medicare program caused by Isabel Guerra were introduced to the trial jury for their determination of losses beyond a reasonable doubt.

Witness Mauricio Abanto was the government informant used by the government for several months to offer advertising and then provide a cash discount back to Ocean Medical. In the process he stole $54,000 from the FBI and was indicted. (R.doc. #160 pp.13-14) He had pleaded guilty to unrelated offenses and was expecting a sentence reduction (pp.53-54).

Abanto testified that even if the funds used by Isabel Guerra to buy his advertising were legitimate funds and not funds from any illegal activity, that this constituted "money laundering", and that he had no knowledge that Isabel Guerra ever paid any patient recruiters. (R. doc. #160 pp.18-21)

Also that the transactions between Ocean Medical and his company were private transactions between two private companies and had nothing to do with the Medicare program (p.23); that he knew that Isabel Guerra was only the 50% owner of United Phar-

macy, and that she used her portion of United Pharmacy to service only her preexisting patients of Ocean Medical; and that Isabel Guerra only went by United Pharmacy a couple of times a week (R.doc. #160 pp.26-28).

Also that Isabel Guerra told him she was going to use those checks for advertising as a company expense for tax purposes to reduce her income tax bill at Ocean Medical (pp.29-30); and that he had no evidence whatsoever of Isabel Guerra ever committing any Medicare fraud at either Ocean Medical or United Pharmacy; that Isabel Guerra thought she was actually going to receive legitimate advertising for Ocean Medical; that he, Abanto, was giving instructions to Isabel Guerra as to how to claim the advertising expenses in her income taxes; that the conversations he had with Isabel Guerra were all normal and legitimate about the prices charged for different orthotic devices; and that he had no videotapes or any other evidence that Isabel Guerra ever had or had paid any patient recruiters (pp.31-35)

Witness Stephen Robinson was the IRS expert on money laundering. He testified that tax evasion and money laundering are two separate and different violations; that if the monies from Medicare deposited into the Ocean Medical account or the 50% portion of Isabel Guerra at United Pharmacy account, were legitimate monies, that in that case the cashing of the checks by informant Abanto did not constitute money laundering, and that he had no knowledge of any illegal activity made with the cash funds received by Isabel Guerra (R.doc. #160 pp.102-105, 124) That all the checks from Ocean Medical were readily identifiable and properly signed; that he had no evidence that Isabel Guerra ever destroyed any records, and

that he had no evidence whatsoever that any of the patients of Ocean Medical had not received the orthotics as prescribed by their doctors, which would have constituted health care fraud. (pp.113-116)

Robinson further testified that he had no knowledge of any false claim ever made by Ocean Medical nor any knowledge that Ocean Medical ever paid any patient recruiters. (pp.11-118) At the end of Robinson's testimony the lower court advised the government to focus on the issue of whether the funds used came from Medicare fraud indicating "there may be some more evidence in that regard". (p.135) The government conceded that legitimate patients that are referred by a paid patient representative allows the intermediary insurance company to "invalidate the claim", meaning the insurance company will not pay for that claim even if the products were delivered to the Medicare patient and the patients had a medical necessity for the product. The government then equated this civil invalidation with "Medicare fraud" (R.doc. #162 p.2), and the court warned the government of constantly using the term "kickback" when in fact the actual language of the Medicare regulation was broader than that. (pp.6-7) The government's prosecution in this case boiled down to the paid patient representatives of codefendant Carlos Gonzalez.

Witness FBI S/A Wendy Evans indicated that Ocean Medical was servicing or had serviced 478 Medicare beneficiaries; (R.doc. #162 p.38) that Ocean Medical had been in business since 1995 but she had no evidence of any Medicare fraud during all these years; that she did not know if the Medicare regulations had changed in the six years since 1995 to 2001, and that as part of her investigation she was able to determine how much money Isabel Guerra had in her

bank accounts and what properties she owned. (pp.53-57) Evans testified she had no evidence that the Medicare patients mentioned had not received their medications; that although she had personally added the 19 names of Medicare patients as the 19 counts in the indictment, she did not have the actual patient files and therefore the jury could not look at the Medicare patient files kept by Ocean Medical on the 19 counts in the indictment; that she only searched for two (2) patient files but was somehow "unable to identify the patient files"; and that she had no way of knowing anything about the actual patient files at United Pharmacy because she could not "go through them", because somehow she was "unable to locate the patient files" (pp.62-65)

Evans stated that she had spoken to about 40 or 50 patients but was not sure whether she had actually spoken with any patient of Ocean Medical or of United Pharmacy; again that she could not say whether any of these Medicare patients ever received or not their orthotics as prescribed by their doctors, but that she had decided not to bring any of the actual Medicare patients to testify at trial:, that she did not know if the United Pharmacy patients actually received their medications although the names of the patients and the name of the medications were all in the labels attached to the medications; (pp.58-59) that one of the counts, the wheelchair, had actually been purchased by Ocean Medical and actually dispensed to the Medicare patient.

That she was providing her opinion as to what the alleged imperfections in the paperwork meant, although all the contents in the paperwork seemed to be perfectly in order; (pp.66-85), and that she could have interviewed the Medicare patients had she

wanted to, but chose instead not to talk to the Medicare patients themselves. (pp.96-104) That she knew she was supposed to provide any exonerating evidence discovered during her investigation to the prosecution and the defense. (pp.51-52) But although allegedly having interviewed 40 to 50 patients, Evans never provided the FBI 302 reports of interviews with any Medicare patient to the defense, in violation of the Standing Discovery Order. (R.doc. #162 p.154) Isabel Guerra respectfully contends that there can only be two reasons why Evans never submitted any FBI forms 302 to the defense. Either she never interviewed one single Medicare beneficiary serviced by Isabel Guerra, or she did not like their answers. Either way, her analysis and subsequent "opinion" was flawed.

Witness Tanya Moore worked for the intermediary insurance company CMS in their fraud and abuse department indicating that her company would not pay for a claim if there was a commissioned patient representative involved, even if the claim was for a legitimate Medicare beneficiary with a real medical necessity for the prescription, even if it does not cost the Medicare program one cent, because patient received the medication or orthotic because of financial inducement and not based on quality of care, and that in this case there had been no losses to the Medicare program based on the commission payments made by codefendant Carlos Gonzalez to his patient representatives. (pp.127-135)

There was absolutely no evidence in this case that any single one of the Medicare patients serviced by Ocean Medical or the 50% portion of United Pharmacy owned by Isabel Guerra ever received any orthotics or medication based on "financial inducement' by Isabel Guerra and not based on real medical ne-

cessity. Isabel Guerra did not have any commissioned patient representatives.

The lower court properly noted that this case was not about the Medicare patients not receiving their orthotics or medication, but rather on the commissions paid to the representatives by codefendant Carlos Gonzalez, and that according to case law a violation of the anti-kickback statute is not necessarily a violation of the Federal Claims Act because the fraud must be perpetrated on the government, the Medicare program in this case, (pp.154-156) and questioned the fact that the government had introduced no evidence tying one single of the 19 claims listed as counts in the indictment to any specific type of Medicare fraud other than the paid recruiters of Carlos Gonzalez. (pp.171-173) The government admitted that it had no testimony of any single Medicare patient as to not having received the prescribed orthotics or medication where Isabel Guerra was involved. (pp.198-199)

* * * *

charged conspiracy, proof of such misrepresentations alone did not prove that the defendants joined the "key man's" conspiracy to embezzle and fraudulently redeem game stamps. Id. This Court stated that the variance in the proof prejudiced the defendants. *Id.* at 811;

On November 28, 2005, the lower court sua sponte vacated the final order of forfeiture it had entered on November, 17, 2005. (R.E. #18)

SUMMARY OF THE ARGUMENTS SECTION.

The case was infected with both constitutional and statutory Booker errors. There was insufficient evi-

dence to convict Isabel Guerra of Medicare fraud or money laundering. There were fatal variances present in this case.

CONCLUSION

The conviction against Isabel Guerra should be vacated and appellant released pending final ruling from this Honorable Court.

APPENDIX G

SOUTHERN DISTRICT OF FLORIDA

Case No. 05-20144-CR-HUCK

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ISABEL GUERRA, *et al.*,
Defendant(s),

FINAL ORDER AND JUDGMENT OF FORFEITURE

THIS CAUSE is before the court upon motion of the United States for entry of a Final Order and Judgment of Forfeiture. Being fully advised in the premises, the Court finds as follows:

1. On June 17, 2005, this Court entered a Preliminary Order and Judgment of Forfeiture [DE #197], condemning and forfeiting the interest of defendant ISABEL GUERRA (hereinafter referred to as "defendant") in the following property to the United States of America pursuant to 18 U.S.C. § 982(a)(7) and 21 U.S.C. § 853 .

a. A money judgment in the amount of $9,405,114.90 in United States currency;

f. One piece of real property located at 192 LaPaloma Road, Key Largo, Florida, more fully described as Lot 22 in Block 1, of AMENDED PLAT OF WINSTON WATERWAYS SUBDIVISION according to the Plat

thereof, as recorded in Plat Book 42, at page 144, of the public records of Monroe County, Florida;

j. One 2004 GMC Yukon XL, VIN 3GKEC16Z 34G302364;

k. One 2001 Chevrolet 3500, VIN 1GCJC33131 F172491;

l. One 2002 Continental Trailer, VIN 1ZJBE 14162M008424;

m. One 2003 Continental Trailer, VIN 1ZJBA 31343M014236;

n. One 2003 34' Donzi Vessel, VIN DNAF 60091203;

o. One 2002 Suzuki Motorcycle GSX1300RK2, VIN ISIGW71A822101513;

v. All funds on deposit and interest accrued thereto for Bank of America Account No. 3673304237;

w. All funds on deposit and interest accrued thereto for Bank of America Account No. 3677610778;

y. All funds on deposit and interest accrued thereto for Bank of America Account No. 91000045965339;

aa. All funds on deposit and interest accrued thereto for Colonial Bank Account No. 8032898606;

cc. All funds on deposit and interest accrued thereto for Interamerican Bank Account No. 450009683;

dd. All funds on deposit and interest accrued thereto for Interamerican Bank Account No. 450009139;

ee. All funds on deposit and interest accrued thereto for First Union National Bank Account No. 13122051183837;

ff. All funds on deposit and interest accrued thereto for First Union National Bank Account No. 33120270206186;

gg. All funds on deposit and interest accrued thereto for First Union National Bank Account No. 9983798061;

hh. All funds on deposit and interest accrued thereto for Washington Mutual Bank Account No. 39300004505691;

s. A money judgment in the amount of $248,500.00 representing checks from Ocean Medical's First Union National Bank Account No. 9983798061 to Panorama Medico and Florida Advertising Group; and

t. A money judgment in the amount of $450,051.00 representing checks form United Pharmacy Discount's First Union National Bank Account No. 2000006265339 to Panorama Medico and Florida Advertising Group.

2. On September 14, 2005, the United States published notice of this forfeiture, the intent of the United States to dispose of the property in accordance with the law, and notice to all third parties of their right to petition the Court within thirty (34) days for a hearing to adjudicate the validity of their alleged legal interest in the property, in a newspaper of general circulation, the Miami Daily Business

Review. The Proof of Publication was filed with this Court on September 23, 2005. [DE # 266]

3. On September 29, 2005, third party petitioners Isabel Guerra, on behalf of her minor daughter Vanessa Isabel Rodriquez, Isabel Santos and Juan Paula filed claims as to their alleged respective interests in the following assets:

f. One piece of real property located at 192 LaPaloma Road, Key Largo, Florida, more fully described as Lot 22 in Block 1, of AMENDED PLAT OF WINSTON WATERWAYS SUBDIVISION according to the Plat thereof, as recorded in Plat Book 42, at page 144, of the public records of Monroe County, Florida;

j, One 2004 GMC Yukon XL, VIN 3GKEC16 Z34G302364;

k. One 2001 Chevrolet 3500, VIN IGCJC 3313IFI72491;

n. One 2003 34' Donzi Vessel, VIN DNAF 60091203;

o. One 2002 Suzuki Motorcycle GSX1300RK2, VIN JS1GW71A822101513:

v. All funds on deposit and interest accrued thereto for Bank of America Account No. 3673304237;

w. All funds on deposit and interest accrued thereto for Bank of America Account No. 91000045965339;

cc. All funds on deposit and interest accrued thereto for Interamerican Bank Account No. 450009683; and

gg. All funds on deposit and interest accrued thereto for First Union National Bank Account No. 998379806I.

4. On October 20, 2005, Juan Paula filed a claim with respect to his alleged interest in the hinds on deposit and interest accrued thereto for Washington Mutual Bank Account No. 39300004505691 (hh.).

5. No other third party claims were filed.

6. On December 19 and 20, 2005, the Court held an ancillary hearing to determine whether any of the third-party claims would defeat forfeiture in favor of the United States.

7. On January 11, 2006, the Court issued its Findings of Fact and Conclusions of Law with respect to the ancillary hearing. [DE # 386] Those Findings of Fact and Conclusions of Law are incorporated by reference herein.

ORDERED AND ADJUDGED:

l. That the following property is forfeited to the United States with all right, title, and interest vested in the United States:

f. One piece of real property located at 192 LaPaloma Road, Key Largo, Florida, more fully described as Lot 22 in Block 1, of AMENDED PLAT OF WINSTON WATERWAYS SUBDIVISION according to the Plat thereof, as recorded in Plat Book 42, at page 144, of the public records of Monroe County, Florida;

k. One 2001 Chevrolet 3500, VIN IGCJC33131F 172491;

l. One 2002 Continental Trailer, VIN 1ZJBE 14162M008424;

m. One 2003 Continental Trailer, VIN IZJBA 31343M014236;

n. One 2003 34' Donzi Vessel, VIN DNAF 60091203;

o. One 2002 Suzuki Motorcycle GSX1300RK2, VIN JS1GW71A822101513;

v. All funds on deposit and interest accrued thereto for Bank of America Account No. 3673304237;

w. All funds on deposit and interest accrued thereto for Bank of America Account No. 3677610778;

y. All funds on deposit and interest accrued thereto for Bank of America Account No. 91000045965339;

aa. All funds on deposit and interest accrued thereto for Colonial Bank Account No. 8032898606;

cc. All funds on deposit and interest accrued thereto for Interamerican Bank Account No. 450009683;

dd. All funds on deposit and interest accrued thereto for Interamerican Bank Account No. 450009139;

ee. All funds on deposit and interest accrued thereto for First Union National Bank Account No. 13122051183837;

ff. All funds on deposit and interest accrued thereto for First Union National Bank Account No. 33120270206186;

gg. All funds on deposit and interest accrued thereto for First Union National Bank Account No. 9983798061; and

hh. All funds on deposit and interest accrued thereto for Washington Mutual Bank Account No. 39300004505691.

2. That the following property be returned by the United States to Claimant Juan Paula:

j. One 2004 GMC Yukon XL, VIN 3GKEC16Z 34G302364;

3. That any other interest, title, or claim to the forfeited properties held by any other person is hereby terminated.

4. That the United States Marshals Service shall dispose of the property identified in the Preliminary Order of Forfeiture in this action, as further identified in paragraphs (1) and (2) above, in accordance with the law.

5. This Court shall retain jurisdiction of this case to ensure the disposition of property and distribution of proceeds consistent with any other Order of this Court.

6. The Clerk is hereby directed to send copies of this Order to all counsel of record.

DONE AND ORDERED at Miami, Florida this 6th day 0f February, 2005.

/s/ Paul C. Huck
Paul C. Huck
United States District Judge

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-14864
District Court Docket No. 05-20144-CR-PCH

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

PURA MEDINA, ISABEL CANEPA, ISABEL GUERRA,
Defendants-Appellants,

CARLOS GONZALEZ,
Defendant.

Entered: May 11, 2007

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT.

No. 05-14864

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

PURA MEDINA, ISABEL CANEPA, ISABEL GUERRA,
Defendants-Appellants.

May 11, 2007.

Before TJOFLAT, FAY and SILER,* *Circuit Judges*.

FAY, *Circuit Judge*:

Defendants Pura Medina, Isabel Canepa, and Isabel Guerra (collectively "defendants") appeal their convictions for Conspiracy to Defraud the United States, Commit Health Care Fraud, and to Pay Kickbacks under 18 U.S.C. § 371, Health Care Fraud under 18 U.S.C, § 1347, Conspiracy to Commit Money Laundering under 18 U.S.C. § 1956(2), and Money Laundering under 18 U.S.C. § 1956(a)(1)(B). Defendants argue that the government did not produce sufficient evidence to warrant their convictions, and that the district court erred at sentencing when calculating the amount of loss. For the reasons set out below, we vacate the convictions of Canepa on all counts except the conspiracy to pay kickbacks count, and we

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* designation.

find that her loss amount was erroneously calculated at sentencing. As to Medina, we vacatc her conviction on all counts of the indictment As to Guerra, we vacate her convictions on the six substantive health care fraud counts involving Ocean Medical Supply that occurred before May 4, 2001, but affirm all the remaining convictions. We also find that her loss amount was erroneously calculated at sentencing. Accordingly, we remand for re-sentencing as to Guerra and Canepa, and remand with instructions to dismiss all counts as to Medina.

BACKGROUND

This case arises from transactions involving Ocean Medical Supply ("Ocean") ant United Pharmacy ("United"). Guerra owned 50% stakes in both companies.[1] Ocean deal) in Durable Medical Equipment ("DME": such as braces and oxygen tanks while United was a typical pharmacy that dealt in prescription drugs. Canepa was the secretary at Ocean and Medina was the secretary/technician at United.

At trial, Rubin Martinez, another pharmacy owner, testified that before Guerra and Gonzalez became Medicare providers through Ocean and United, they worked as patient recruiters, bringing patients to Martinez's pharmacy in exchange for illegal kickbacks. However, after receiving their own provider numbers through Medicare, Guerra and Gonzalez began taking the patients to their own businesses—Ocean and United.

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[1] Isabel Santos, Guerra's mother, was the other SO% owner of Ocean. Samos was a co-defendant at trial, but was acquitted pursuant to; motion under Rule 29 of the Federal Rules of Criminal Procedure. Carlos Gonzalez was the other 50% owner at United and was convicted at trial along with Guerra, Canepa, and Medina. However, hc is not a party to this appeal.

There is testimony from Wendy Evans, a Special Agent with the FBI, that Guerra, in her capacity as part owner of both Ocean and United, signed documents to become a Medicare provider. Among other things, these documents certified that the Medicare provider would abide by the relevant Medicare regulations, specifically 42 CFR § 424.57. Subsection (c)(1) of this regulation provides that the supplier must "[o]perate[ ] its business and furnish[ ] Medicare-covered items in compliance with all applicable Federal and State licensure and regulatory requirements." According to Special Agent Evans's testimony, Guerra signed these documents for Ocean on May 4, 2001, and for United on May 18, 2000.

Several witnesses testified about the schemes Ocean and United were conducting. Nearly all the evidence presented at trial concerned kickbacks for patients, doctors, an orthotic fitter, and patient recruiters. Kickbacks were paid to entice patients to submit their medicare claims through Ocean and/or United. A number of patient recruiters testified that they would bring patients who needed to fill prescriptions to Ocean or United in exchange for 50% of the profits made after submitting the claim to Medicare. The recruiter would then share their 60% with the patient. Recruiters also testified that doctors were paid to send patients to United and Ocean, including a Dr. Brito who worked across the hall from Ocean.

Miguel Ugarte, an orthotic fitter who measured and constructed braces for Ocean's customers, testified that he was paid $25 to measure each patient Ocean sent him. He also testified that he did not actually measure many of the patients himself, despite signing forms to that effect.

Mauricio Abanto, a government informant, testified about his interactions with the defendants. Abanto testified that he was in the business of money laundering and dealt with several Medicare providers, including Ocean and United. Abanto used his advertising businesses as a cover to give the impression that any money Medicare providers paid him was for advertising. When federal authorities confronted him, he agreed to cooperate and videotape his money laundering transactions. Several videos were admitted at trial that showed all three defendants meeting separately with Abanto. During the taped encounters they would generally give him a check for $10,800, and they would get back $10,000 in cash. Abanto would keep the remaining $800 as a fee for cashing the checks.

The defendants would count the money and sometimes would discuss their scheme. While Guerra usually dealt with Abanto on behalf of Ocean, Canepa, Guerra's secretary, dealt with Abanto when Guerra was unavailable. Canepa was recorded as saying that Ocean needed the cash to pay doctors and patients with whom they did business. Canepa also stated that patients were being paid $250 per knee brace.

Usually Carlos Gonzalez dealt with Abanto on behalf of United. However, there were some instances when Medina received and counted the cash delivered, and where she wrote out checks for Abanto. However, she did not sign any of the checks herself. In one instance, Medina was quoted as saying they "needed the money by Tuesday." However, on cross examination, Abanto testified that whenever Gonzalez and he would talk about the kickback scheme, Gonzalez would send Medina out of the room because

she was just a secretary and Gonzalez didn't want her knowing that the cash was for paying kickbacks. The defendants were convicted on all the counts put before the jury[2]

At sentencing, after the defendants were convicted, the district court determined that every claim United and Ocean submitted to Medicare was fraudulent, and thus, every one of those claims that medicare paid was part of the total loss calculated under U.S.S.G. § 2B1.1(b)(1). The district court calculated Ocean's loss amount to be $1,863,962.84. This loss amount was attributed to Canepa, raising her base offense level by 16. The district court calculated United's loss amount while Medina was employed[3] at $6,173,828 which raised her base offense level by 18. Finally, since Guerra was involved with both Ocean and United through the entire time period of the indictment, her loss amount was the total Medicare paid to both businesses, $9,405,114.90. This loss amount raised Guerra's base offense level by 20 under the sentencing guidelines.

With these loss amounts taken into ac-count, the district court sentenced Guerra to 99 months in prison, and Canepa and Medina in 48 months in prison.

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[2] Pursuant to Rule 29 Motions for Judgment of Acquittal, the district court dismissed four of the substantive health care fraud counts as well as the "conspiracy to structure transactions" count, brought under 18 U.S.C. § 371, before the case was sent to the jury.

[3] Medina stopped working at United in December of 2002, when Carlos Gonzalez sold his interest in United to Guerra. Any United losses calculated from December 2002 through April 2003 were attributed solely to Guerra.

STANDARD OF REVIEW

There are two issues before this Court:

I Whether there was sufficient evidence of the charged offenses to sustain the defendants' convictions.

II. Whether the district court erred in calculating the amount of loss at sentencing.

[1] When analyzing sufficiency of the evidence, our review is de novo, but we must "resolve all reasonable inferences and credibility evaluations in favor of the jury's verdict." *United States v. Rudisill*, 187 F.3d 1260, 1267 (11th Cir. 1999) (quoting *United States v. Suba*, 132 F.3d 662, 671 (11th Cir. 1998) (internal quotes omitted)). However, the evidence must be sufficient that a reasonable jury could find that the government has proven guilt beyond a reasonable doubt. *United States v. Lopez-Ramirez*, 68 F.3d 438, 440 (11th Cir. 1995) (citing *United Stoles v. Thomas*, 8 F.3d 1562, 1655 (11th Cir.1993)) *see also Jackson v. Virginia*, 443 U.S. 307, 317-18, 99 S.Ct. 2781, 2788, 61 LEd.2d 560 (1979).

[2, 3] The interpretation of the sentencing guidelines is a question of law that is reviewed de novo. *United States v. Malol*, 476 F.3d 1283, 1291 (11th Cir. 2007). However, the amount of loss determination at sentencing is reviewed for clear error. *United States v. Nostari-Shamloo*, 265 F.3d 1290, 1291 (11th Cir.2001); *United States v. Cabrera*, 172 F.3d 1287, 1292 (11th Cir.1999).

ANALYSIS

1. *Sufficiency of the Evidence A Health Care Fraud*

A. Health Care Fraud

The government indicted the four defendants on a total of 19 counts of substantive health care fraud

under 18 U.S.C. § 1347.[4] The statute provides in pertinent part that:

> Whoever knowingly and willfully executes, or attempts to execute, a scheme or artifice-(1) to defraud any health care benefit program; or (2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program,
>
> in connection with the delivery of or payment for health care benefits, items, or services shall be fined under this title or imprisoned not more than 10 years, or both . . .

The district court dismissed four of the counts before the remaining 15 went to the jury[5]

[4] When discussing what constitutes "defrauding" the United States, the Supreme Court has stated:

> To conspire to defraud the United States means primarily to cheat the government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary that the government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane, or the

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[4] None of the 19 counts charged all of the defendants together. Guerra was charged in all 19 counts. Canepa was charged in 10 counts. Medina was charged in 9 counts. Isabel Santos, the fifth defendant, was not charged in any of the health care fraud counts.

[5] See note 2 *infra*

> overreaching of those charged with carrying out the governmental intention.

Hammerschmidt v. United States, 265 U.S. 182, 188, 44 S.Ct. 611, 512, 68 L.Ed. 968 (1924). The Tenth Circuit has held, and we adopt their holding, that in a health care fraud case, the defendant must be shown to have known that the claims submitted were, in fact, false. *United States v. Laughlin*, 26 F.3d 1522, 1526 (10th Cir.1994),

[5] The government argues the fact that patients received kickbacks for patronizing Ocean and United "taints" any claims the defendants made to Medicare on those patients' behalf. The government also argues that even if the prescriptions involved were medically necessary, and the patient received what was prescribed, the payment of a kickback is sufficient to establish the falsity required to defraud Medicare. In furtherance of this argument, the government offered the testimony of Tanya Moore, a Center for Medicare and Medicaid Services employee. Moore testified that if Medicare had the knowledge that a kickback had been paid to a patient or doctor, they would not pay the claim.

We hold that based on the facts of this case, representatives of Ocean and United paying kickbacks alone is not sufficient to establish health care fraud. While we acknowledge that paying kickbacks like those at issue in this case is a violation of 42 U.S.C. § 1320a-7b(b)(2)(A), we cannot hold that this conduct alone is sufficient to establish health care fraud without someone making a knowing false or fraudulent representation to Medicare. *See United States v. Porter*, 591 F.2d 1048, 1056-56 (5th Cir.1979) (conspiracy to commit health care fraud was weakened where

alleged kickbacks did not involve materially false statements or any money/property loss to Medicare.)

The government argues that representatives of both Ocean and United signed documents promising to abide by all of Medicare's rules and regulations when they registered to become Medicare Providers. Therefore, the government asserts that whenever anyone on behalf of Ocean and United Piled claims where patients or doctors had received kickbacks in violation of the pertinent rules of Medicare, the defendants committed health care fraud.

[6] This argument is only convincing as to Guerra. Given Rubin Martinez's testimony, a jury could reasonably conclude that Guerra was involved in paying kickbacks before becoming a Medicare Provider at Ocean and United. There is also the testimony from Special Agent Evans that Guerra signed documents to become a Medicare Provider stating that she would follow all applicable Medicare rules and regulations. In disputably, one of those rules would be to refrain from paying doctors and patients kickbacks in violation of 42 U.S.C. § 1320a-7b(b)(2)(A). Based on testimony that Guerra was a patient recruiter who paid patients to go to Rubin Martinet's pharmacy before she became a Medicare Provider, a jury could have reasonably concluded that Guerra knew full well she would continue to pay kickbacks when she signed the forms promising that she would not. Therefore, signing the Medicare Provider applications would qualify as a knowing misrepresentation under 18 U.S.C. § 1347. The government presented ample evidence to show that the kickback pattern continued after Guerra signed the forms. The record contains testimony from several patient recruiters who were paid to bring patients to Ocean or United through

2003. Also, the testimony of Alma-to, the government informant, could lead a reasonable jury to conclude kickbacks were still being paid. Therefore, a reasonable jury could conclude that Guerra committed health care fraud after she signed the applications stating that she would follow Medicare's rules and regulations.

Special Agent Evans testified that Guerra signed the Medicare Provider applications for United and Ocean on May 18, 2000 and May 4, 2001, respectively. Since these are the only knowing misrepresentations we have found upon a thorough review of the record, it follows that any count of substantive health care fraud that occurred before Guerra signed the company's documents must fail. The first six health care fraud counts against Ocean in the indictment occurred before May 4, 2001 when Guerra signed Ocean's Medicare Provider application.[6] Therefore, there is simply no evidence to support the guilty verdicts as to counts 2, 4, and 7. No false representation had been made to Medicare when the claims in those counts were submitted. Furthermore, since no evidence was presented that either Canepa or Medina was aware that Guerra had made these false representations to Medicare, this evidence is not sufficient to establish fraud as to those two defendants. *Laughlin*, 26 F.3d at 1526.

[7] The government attempted to prove health care fraud as to Canepa and Medina by offering several other pieces of evidence. First, the government offered the testimony of Dr. Hugo Goldstraj. He testified that several prescriptions made in his name contained a forged signature and an unusually large

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[6] The district court dismissed three of those counts before they were submitted to the jury.

number of refills. However, the government did not offer any evidence that any of the defendants were responsible for falsifying these or any other prescriptions. Nor is there any evidence in the record that the prescriptions at issue prescribed medications or DME that the patients did not need or did not receive. The mere fact that United or Ocean submitted prescriptions with forged signatures to Medicare is insufficient to establish fraud without some evidence that individuals at United or Ocean knew of the forgeries or forged the prescriptions themselves. Therefore, Dr. Goldstraj's testimony is insufficient, standing alone, to establish health care fraud as to any of the defendants.

The government also offered testimony from former patient recruiters for Ocean and United, who stated that they were paid to bring in patients in violation of the kickback statute. However, none of these recruiters presented any evidence that a patient did not receive what they were prescribed, or that a patient did not need what was delivered. Special Agent Evans testified that a few of the oxygen concentrators that Ocean delivered were not being used. She reached this conclusion by examining patient files that recorded the total number of hours an oxygen concentrator was used. According to the files, one such device had only been logged as being used for one hour over the course of a year. In another instance, the number of total hours went down over the course of a year. To be interpreted as health care fraud, however, there must be some evidence present in the record that shows the patients were not legitimately prescribed the oxygen concentrators, or that Ocean and/or United made false or fraudulent representations to Medicare on the patients' behalf. There is no such evidence here. Taken in the light most favorable to the government, this evidence merely establishes

that Ocean's files contained misstatements about how mud Ocean's patients used the oxygen concentrators. There is no evidence that this information was submitted to Medicare in any capacity

Finally, Special Agent Evans testified that United would bill Medicare for an aerosol medication that was manufactured out of the pharmacy, but would then give the patient what is called a "compounded" medication that was mixed in the pharmacy. According to Special Agent Evans, Medicare did not cover compounded medication. It was WS(cheaper to make compounded medication than to purchase manufactured medication On cross examination, however, Specie Agent Evans was asked whether any special patients were billed as receiving manufactured medication but actually received compounded medication. She could not name specific patient, but rather could only stab that this was a general practice at United.

[8] Surely, the government must present some evidence that at least one specific patient reccived compounded medication whet United billed Medicare for manufactured medication to prove health care fraud. A general allegation is not sufficient. The government argues that they could not call as witnesses patients or doctors who were pail kickbacks in violation of 42 U.S.C. § 1320a-7b(b)(2)(A) because, due to their questionable credibility, they would not make 'ideal witnesses." This argument is unconvincing. Many of the witnesses the government presented at trial were under indictment or had already pled guilty to similar kickback and fraud violations, and were testifying in cooperation with the government. The fact that the government can present these witnesses to establish kickbacks, but cannot present paid patients or doc-

tors to show that United and/or Ocean made false claims to Medicare is quite contradictory and disingenuous. More importantly, it is the government's burden to prove every element of the charged offense beyond a reasonable doubt. *Christoffel v. United States*, 338 U.S. 84, 89, 69 S.Ct. 1447, 1450, 93 L.Ed. 1826 (1949); *In re Winship*, 397 U.S. 368, 364, 90 S.Ct. 1068, 1073, 25 L.Ed2d 368 (1970). The government cannot ignore this burden simply because the witnesses who can establish the required elements are less than ideal. Thus, the government has not shown that either Medina or Canepa made any false or fraudulent representations to Medicare, nor did they present evidence that Canepa or Medina defrauded or attempted to defraud any health care program.

Therefore, we hold that Guerra's convictions on counts 2, 4, and 7 are not supported by sufficient evidence, but affirm her other twelve substantive health care fraud convictions. Furthermore, we hold that there is not sufficient evidence in the record to support the guilty verdicts as to Medina or Canepa on the charged substantive health care fraud counts under 18 U.S.C. § 1347. (Counts 2, 4, 6, 7, 9-13, 15-20)

B. Conspiracy to Commit Money Laundering/Money Laundering

[9] The government charged these defendants (and Carlos Gonzalez) with Conspiracy to Commit Money Laundering under 18 U.S.C. § 1956(h), as well as eleven counts of substantive Money Laundering under 18 U.S.C. § 1956(a)(1)(B)(B)(i).[7] For these counts to

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[7] Carlos Gonzalez was the only defendant charged in six of the 11 substantive money laundering counts. Guerra was

succeed, the government must prove that the proceeds were derived from a specified unlawful activity, and that the defendant had knowledge that the proceeds resulted from said unlawful activity. *United States v. Awan*, 966 F2d 1415, 1434 (11th Cir. 1992); *United States v. Nattier*, 127 F.3d 655, 658 (8th Cir. 1997); *United States v, Henry*, 325 F.3d 93, 103 (2d Cir. 2003). The government argues that the health care fraud counts charged in the indictment satisfy the money laundering statute's specified unlawful act requirement.

[10] As discussed previously, there is not sufficient evidence in the record to show that Canepa or Medina participated in or were aware of the charged health care fraud. The government conceded that cashing the checks through their informant, Abanto, and using the cash to pay patients illegal kickbacks was not money laundering in and of itself, since the illegal acts occurred subsequent to the monetary exchange. As such, health care fraud is the only specified unlawful act that could satisfy 18 U.S.C. § 1956.

Therefore, since no evidence exists in the record to establish that Canepa or Medina were aware of the health care fraud, we must vacate their convictions for conspiracy to commit money laundering, as well as all the substantive money laundering counts.

[11] As to Guerra, since there is evidence n the record to sustain some of her convictions for Health Care Fraud, the specified unlawful act requirement is satisfied. Specifically, there is evidence in the record that Guerra and Carlos Gonzalez conspired to Launder money by (1) committing health care Fraud, (2)

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charged in three of the counts, one of which charged Canepa as well. Medina was charged with Carlos Gonzalez in two counts.

cashing checks obtained via the health care fraud through Abanto, the government informant, so that it would appear the funds were legitimately spent on advertising, and (3) using that cash to illegally pay kickbacks to patients and doctors.

Guerra was also charged in three substantive money laundering counts. These counts occurred in October, November, and December of 2001. Since this was after she signed the documents certifying that she would follow Medicare rules and regulations, a reasonable jury could have concluded that Guerra was committing health care fraud, and as such, the requisite specified unlawful activity was present. Therefore, we hold that Guerra's convictions for conspiracy to commit money laundering and substantive money laundering are supported by sufficient evidence.

C. Conspiracy to (a) Defraud the United States, (b) Commit Health Care Fraud, and (c) Pay Kickbacks

[12] The jury convicted the defendants of violating 18 U.S.C. § 371, the multi-objective conspiracy count.[8]

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[8] The Indictment charged a three-objective conspiracy as per 18 U.S.C. § 371:

> (a) to defraud the United States by impairing, impeding, obstructing, and defeating, through deceitful and dishonest means, the lawful government functions of the United States Department of Health and Human Services in its administration and oversight of Medicare;
>
> (b) to commit an offense against the United States, that is. to violate Title 18, United States Code, Section 1347, by knowingly and willfully executing,. and attempting to execute, a scheme and artifice to defraud and to obtain, by means of materially false and fraudulent pretenses, representations, and promises, money and property owned by, and under the 'custody and control of, a health care benefit program, as defined in Title 18, United States

This Court has long held that where there is a conviction for a multi-object conspiracy, the evidence must only be sufficient to sustain a conviction for any one of the charged objectives. *United States v. McKinley*, 995 F.2d 1020, 1025 (11th Cir. 1993) (citing *United States v. Johnson*, 713 F.2d 633, 646 (11th Cir.1983)).

[13] With regard to Guerra, there is ample evidence in the record that she conspired with Carlos Gonzalez and with Canepa, her secretary at Ocean Medical, to pay kickbacks. There is testimony from Rubin Martinez that Guerra and Gonzalez acted as patient recruiters before they opened United together, and before Guerra opened Ocean. Abanto, the government informant, testified that Guerra brought him checks signed in her name in exchange for cash. He also testified that when Guerra was unavailable, Canepa would bring him the checks bearing Guerra's signature. There is testimony from other patient recruiters that Guerra paid them to bring her patients at Ocean, and that Gonzalez paid recruiters to bring patients to United. All of this evidence could lead a reasonable jury to conclude that Guerra conspired with

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Code, Section 24(b), that is, Medicare, in connection with the delivery of and payment for health care benefits, items, and services; and

(c) to commit an offense against the United States, that is. to violate Title 42, United States Code, Section 1320a-7b(b)(2)(A) by knowing!) and willfully offering and paying remuneration (including any kickback and bribe) directly and indirectly, overtly and covertly, in cash and in kind, to induce the referral of Medicare beneficiaries to a person for the furnishing and arranging for the furnishing of any item and service for which payment may be made in whole and in part by Medicare.

Gonzalez and/or Canepa to pay illegal kickbacks to patients in violation of 18 U.S.C. § 371.

[14] All that is required to sustain a conviction for a multi-objective conspiracy is sufficient evidence of one of the objects of the conspiracy. *McKinley*, 995 F.2d at 1025.

Therefore, because there is sufficient evidence in the record to support a conviction as to the third objective of the conspiracy, to pay illegal kickbacks, we need not decide whether there is sufficient evidence in the record to support the other two objectives. As such, we affirm the conspiracy conviction as to Guerra.

There is also sufficient evidence in the record to support Canepa's conviction for conspiracy to pay kickbacks. Abanto testified that Canepa would sometimes bring him checks and collect cash on behalf of Guerra. Guerra's signature was on the checks Canepa brought to Abanto. Furthermore, in Abanto's video recordings, Canepa is seen collecting cash and informing Abanto that they need the money to pay patients. Also in the recordings Canepa is heard saying that patients are paid $250 per knee brace. With all credibility inferences made in favor of the jury's verdict, a reasonable jury could have concluded that Canepa conspired with Guerra to pay kickbacks. Because there exists sufficient evidence to convict Canepa on one objective of the conspiracy, we need not reach the question of whether there was sufficient evidence to convict Canepa of the other conspiracy objectives[9] *McKinley*, 995 F.2d at 1025. Thus, we

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[9] Also worthy of note, Canepa's counsel at oral argument conceded that there is sufficient evidence in the record to show Canepa was involved in paying kickbacks to patients. We appreciate Counsel's candor.

affirm Canepa's conviction under the multi-objective conspiracy count.

[15] On the other hand, there is not sufficient evidence in the record to convince a reasonable jury that Medina is guilty of any offense in the multi-objective conspiracy count. The only relevant evidence the government presented against Medina at trial was Abanto's testimony and videos, He testified that she would exchange checks for cash when Carlos Gonzalez, her boss, was unavailable. The cheeks all bore Gonzalez's signature. The government argues that Medina made statements on the recordings that incriminate her.

The only questionable statement Medina made that the government presented was when she told Abanto, "We need the Money by Tuesday because people are coming." However, when asked on cross to whom Medina was referring, Abanto testified that she only meant her boss, Carlos Gonzalez. If we take Medina's statement in the light most favorable to the jury's verdict, as our review requires, we can infer that she also referred to patient recruiters when she said "people are coming." However, this evidence is still not sufficient for conviction. This statement in no way acknowledges that she is aware that the cash is needed to pay illegal kickbacks rather than for paying lawful United associates. Also worthy of note, Abanto testified that Medina was not aware of the kickback conspiracy, and that Gonzalez told her to leave the room whenever they discussed the details of the scheme. When asked, Abanto said that Medina was "just a secretary."

Since there is not sufficient evidence to support the guilty verdict as to Medina of conspiracy to pay kickbacks, we must look to the other two objectives of the

conspiracy. The other two objectives of the charged conspiracy are (1) to defraud the United States, and (2) to commit health care fraud. As discussed previously, upon a thorough review of the record, there is no evidence that Medina had any knowledge of any health care fraud, or participated in any scheme to defraud the U.S. government.

[16] The government argues that Medina was the technician at United who prepared the compounded medications discussed previously. The argument is that since there was evidence that compounded medication was given to patients when Medicare was billed for manufactured medication, she is guilty of conspiracy to commit health care fraud. Even if we put aside the fact that the evidence in the record is not sufficient to sustain a conviction as to anyone for health care fraud on this ground, Medina's actions in preparing the compounded medication would still not be sufficient to establish her part in a conspiracy. There is no evidence in the record that shows Medina was preparing the compounded medication with knowledge that manufactured medication was actually being prescribed. Thus, there is insufficient evidence to show Medina's knowing participation in a conspiracy to defraud the United States or commit health care fraud. Based on this record, the government offers no other relevant evidence as to any of Medina's actions that would show her participation in a conspiracy for any of the three objectives charged. Therefore, we vacate Medina's conviction as to the multi-objective conspiracy count.

II. Calculating the Loss

Because we vacate Medina's conviction on all counts, we need not address the sentencing issues on her appeal. However, since we affirm some of the

convictions as to Guerra and Canepa, we address one sentencing issue.

Canepa argues, and Guerra adopts her argument, that the district court erred when it held that the entire amount Medicare paid out to United and Ocean from the time period in the indictment, January 2000 throne April 2003, was fraudulent and thus, could be included in the loss amount at sentencing,[10] The government counters that the district court did not err, arguing that there was evidence that the vast majority of patient: were paid illegal kickbacks, and therefore any claim submitted on their behalf was fraudulent. Thus, any money Medicare paid out on those claims is attributable to the loss amount.

[17] Although the Sentencing Guideline are now used in an advisory manner, as per *United States v. Booker*, 543 U.S. 220, 121 S.Ct. 738,160 L.Ed.2d 621 (2005), the district court must still correctly calculate the Ben tenting range prescribed by the guidelines *United States v. Crawford*, 407 F.3d 1174 1178 (11th Cir. 2005). "A district court's determination regarding the amount of loss for sentencing purposes is reviewed for clew error." *United States v. Nostari-Shamloo* 255 F.3d 1290, 1291 (11th Cir. 2001); *United States v. Cabrera*, 172 F.3d 1287, 1292 (MI Cir. 1999). *See also* U.S.S.G. § 2B1.1, comment (n.3(C)) (stating that because "[t]he sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence . . . the court's loss determination is entitled to appropriate deference") (citing 18 U.S.C. § 3742(e) and (f))[11] In calculating the

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[10] This amounted to a $1,863,962.84 loss amount for Canepa and a $9,405,114.90 loss amount for Guerra.

[11] All citations are to the 2004 version of the Sentencing Guidelines.

loss amount, loss is the greater of actual loss or intended loss.[12] U.S.S.G. § 2B1.1, comment (n.3(A)).

[18-20] The district court needs only t make a reasonable estimate of the loss amount. U.S.S.G. § 2B1.1 (b)(1)(D), comment (n.3(C)). A reasonable estimate of the loss amount is appropriate because "often the amount of loss caused by fraud is difficult to determine accurately." *United States v. Miller*, 188 P.3d 1312, 1317 (11th Cir. 1999). But "[w]hile estimates are permissible, courts must not speculate concerning the existence of a fact which would permit a more severe sentence under the guidelines." *United States v. Sepulveda*, 115 F.3d 882, 890 (11th Cir. 1997) (citing *United States v. Wilson*, 993 F.2d 214, 218 (11th Cir. 1993)). The amount of loss must be proven by a preponderance of the evidence, and the burden must be satisfied with "reliable and specific evidence." *Id.* (internal quotes omitted).

The government cites *United States v. Cruz-Natal*, 150 Fed. Appx. 961 (11th Cir. Oct 11, 2005), to argue that the district court did not err in its loss calculation. *Cruz-Natal*, an unpublished opinion, is distinct from the instant case in that there was no argument that the total amount the defendant attempted to recover from Medicare was fraudulent. That case held simply that the district court did not clearly err in finding that the intended loss was the appropriate means by which to calculate loss, because it was greater than the actual loss. *Id* at 964. It did not hold that, as a general matter, the total amount of all

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[12] 12. "Actual loss" is defined as the reasonably foreseeable pecuniary harm resulting horn the offense, and "intended loss" is defined as the pecuniary harm that was intended to result from the offense. U.S.S.G. 2B1.1. comment (n.3(A)(i) and (ii)).

claims submitted to Medicare Is an appropriate loss calculation in Medicare fraud cases.

[21] In the instant case, the district court made no factual findings as to the amount of loss. When Canepa objected to the loss amount, rather than enumerating what "reliable and specific evidence" it used to calculate the loss amount, the district court stated "With regard to the loss amounts for which each of the defendants is to be held accountable those are my findings. I am overruling the objections as to the amount each defendant is to be held responsible for." Without further information from the district court, we cannot determine what factual basis was used to reach the conclusion that every claim submitted to Medicare constituted loss. Indeed, upon our review of the record, there is not sufficient evidence that any of the prescriptions were not medically necessary, or were not delivered to the patients.

As to Guerra, the total amount billed to Medicare on the health care fraud claims that we affirm is only $11,820. We find these claims fraudulent not because they were based on illegitimate prescriptions, but because the patients or doctors received kickbacks after Guerra certified to Medicare that she would not pay such remunerations. There was no evidence presented that these claims were not medically necessary. Even though Tanya Moore testified that Medicare would not pay a claim if they knew parties were receiving kickbacks, this is not sufficient to establish a loss to Medicare. Moore testified that Medicare pays out a fixed amount for every type of claim. Therefore, evidence that shows that United and Ocean paid kickbacks from a fixed level of profits is not sufficient to show actual or intended loss to Medicare. As to Canepa, since we vacate her convictions

on all counts of health care fraud, she cannot be held responsible for any loss resulting from Guerra's fraud.

Therefore, we hold that the district court dearly erred when it did not make specific factual findings upon which to base the loss amounts attributable to each individual defendant.

CONCLUSION

As to Guerra, we vacate her convictions on the first three counts of health care fraud that occurred before she signed the relevant documents which certified that she would follow Medicare rules and regulations. We affirm her convictions on the multi-objective conspiracy count, the 12 remaining counts of health care fraud, the conspiracy to commit money laundering, and the substantive money laundering counts.

As to Canepa, we vacate her convictions on all health care fraud counts, the conspiracy to commit money laundering count, and all substantive money laundering counts. We affirm, however, her conviction on the multi-objective conspiracy count. The sentences imposed upon Guerra and Canepa are vacated and their cases are remanded to the district court for resentencing.

As to Medina, we vacate her convictions and sentences on all counts in the indictment, and remand to the district court with instructions to dismiss the charges,

CONVICTIONS AFFIRMED IN PART AND REVERSED IN PART AS TO GUERRA AND CANEPA; SENTENCES VACATED AND THE CASE REMANDED FOR RESENTENCING AS TO GUERRA AND CANEPA; CONVICTIONS REVERSED AN SENTENCES VACATED AS TO MEDINA.

APPENDIX I

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

[Filed 02/20/2008]

Case Number: 05-CR-20144-PCH
USM Number: 65675-004

UNITED STATES OF AMERICA,

v.

ISABEL GUERRA.

AMENDED JUDGMENT IN A CRIMINAL CASE

The defendant was found guilty on Count(s) 1, 6, 9-13, 15-20, 21, 24, 27 and 28 of the Indictment.

The defendant is adjudicated guilty of the following offense(s):

Title/Section Number	Nature of Offense	Offense Ended	Count
18 U.S.C. § 371	Conspiracy to commit Health Care Fraud and to pay kickbacks	April 30, 2003	1
18 U.S.C. §§ 1347 and 2	Health Care Fraud	April 30, 2003	6
18 U.S.C. §§ 1347 and 2	Health Care Fraud	April 30, 2003	9-13

18 U.S.C. §§ 1347 and 2	Health Care Fraud	April 30, 2003	15-20
18 U.S.C. § 1956(h)	Conspiracy to Commit Money Laundering	April 30, 2003	21
18 U.S.C. §§ 1956 (a)(1)(B)(1) and (2)	Money laundering	April 30, 2003	24
18 U.S.C. §§ 1956 (a)(1)(B)(1) and (2)	Money laundering	April 30, 2003	27
18 U.S.C. §§ 1956 (a)(1)(B)(1) and (2)	Money laundering	April 30, 2003	28

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material changes in economic circumstances.

Date of Original Judgment:
August 24, 2005
(Or Date of Last Amended Judgment)

Reason for Amendment:

☒ Correction of Sentence on Remand (18 U.S.C. 3742(1)(1) and (2))

☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))

☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))

☐ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P.36)

☐ Modification of Supervision Conditions (18 U.S.C. §§3563(c) or 3583(e))

☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))

☐ Modification of Imposed Term of Imprisonment for Retroactive to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))

☐ Direct Motion to District Court

☐ 28 U.S.C. § 2255 or

☐ 18 U.S.C. § 3559(c)(7)

☐ Modification of Restitution Order (18 U.S.C. § 3664)

Date of Imposition of Sentence:
February 13, 2008

/s/ Paul C. Huck
Paul C. Huck
United States District Judge

February 19, 2008

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 60 Months as to Count 1 and 70 months as to counts 6, 9-13, 15-20, 21, 24, 27, 28. Counts 1, 6, 9-13, 15-20, 21, 24, 27 and 28 are to be served concurrently.

The defendant shall be allowed to remain on bond pending the results of her appeal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at_____, with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By:_____

Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years as to Counts 1, 6, 9-13, 15-20, 21, 24, 27 and 28. Counts 1, 6, 9-13, 15-20, 21, 24, 27 and 28 shall be served concurrent.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;

5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6. The defendant shall notify the probation officer at least ten (10) days prior to any change in residence or employment;

7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. The defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

The defendant shall perform 300 hours of community service per year of supervised release as monitored by the U.S. Probation Officer for a total of 900 community service hours. The Defendant shall performed the required community service hours on an annualized basis (i.e. no carry ovens).

No New Debt Restriction: The defendant shall not apply for, solicit, or incur any further debt, included but not limited to loans or lines of credit, either as a principal, co-signer or guarantor, as directly or through any related entity or organization, without first obtaining permission from the Court.

The defendant shall provide complete access to financial information, including disclosure of all business and personal finances, to the U.S. Probation Officer.

The defendant shall maintain full-time, legitimate employment and not be unemployed for a term of more than 30 days unless excused for schooling, training or other acceptable reasons. Further, the defendant shall provide documentation including, but not limited to pay stubs, contractual agreements, W-2 Wage and Earnings Statements, and other documentation requested by the U.S. Probation Officer.

Self-Employment Restriction: The defendant shall obtain prior written approval from the Court before entering into any self-employment.

Health Care Business Restriction: The defendant shall not own, directly or indirectly, or be employed, directly or indirectly, in any health care business or service, which submits claims to any private or government insurance company, without the Court's approval.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments.

Total Assessment	Total Fine	Total Restitution
$1,700**	$1,300,000.00 ***	$

During the period of incarceration, payment shall be made as follows: (1) if the defendant earns wages in a Federal Prison Industries (UNICOR) job, then the defendant must pay 50% of wages earned toward the financial obligations imposed by this Judgment in a Criminal Case. These payments do not preclude the government from using other assets or income of the defendant to satisfy the fine obligations.

Upon release of incarceration, the defendant shall pay restitution at the rate of 10% of monthly gross earnings, until such time as the court may alter that payment schedule in the interests of justice. The U.S. Bureau of Prisons, U.S. Probation Office and U.S. Attorney's Office shall monitor the payment of the fine and report to the court any material change in the defendant's ability to pay.

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

** Defendant shall receive $1,000 credit against the total assessment which she has already paid to the Bureau of Prisons.

*** If determined that the total forfeiture amount of $7,641,968.98 is incorrect, the maximum line of $1.3 million dollars will be imposed. In addition, the Preliminary Order of Judgement and Forfeiture (D.E. #197) dated June 17, 2005 shall be incorporated into this amended judgment with the following correction: A money judgment in the amount of $7,641,968.98.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Filed 02/20/2008]

Case No. 05-20144-CR-HUCK

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ISABEL GUERRA,
Defendants.

PRELIMINARY ORDER AND JUDGMENT OF FORFEITURE

THIS CAUSE is before the Court upon motion of the United States for entry of a preliminary order of forfeiture. Being fully advised in the premises and based on the motion of the United States and the record in this matter and for good cause shown thereby, the Court finds as follows with respect to forfeiture in this action as to defendant ISABEL GUERRA (hereinafter referred to as "defendant"):

1. In the Indictment in the above-styled case, the government sought forfeiture of the defendant's interest in any property derived from or traceable to the commission of federal health care offenses and conspiracy to commit federal health care offenses, in violation of Title 18, United States Code, Sections 371, 1347, and 1320a-7b(b), pursuant to Title 18, United States Code, Section 982(a)(7) and Title 21, United States Code, Section 853. The government further sought forfeiture of the defendant's interest in any property involved in or traceable to the

commission of money laundering and conspiracy to commit money laundering offenses, in violation of Title 18, United States Code, Sections 1956(a)(1)(B)(i) and 1956(h), pursuant to Title 18, United States Code, Section 982(a)(1) and Title 21, United States Code, Section 853.

2. On June 9, 2005, the defendant was found guilty after trial by jury as to Counts 1, 2, 4, 6, 7, 9 through 13, 15 through 21, 24, 27, and 28 of the Indictment. The jury also returned a verdict as to the forfeiture count of the Indictment. The jury found, with respect to Isabel Guerra, that the following constituted or were derived, directly or indirectly, from proceeds traceable to the commission of the health care fraud as charged in Counts 1 through 20 of the Indictment:

a. A money judgment in the amount of $9,405,114.90;

f. One piece of real property located at 192 LaPaloma Road, Key Largo, Florida, more fully described as Lot 22 in Block 1, of AMENDED PLAT OF WINSTON WATERWAYS SUBDIVISION according to the Plat thereof, as recorded in Plat Book 42, at Page 144, of the public records of Monroe County, Florida;

j. One 2004 GMC Yukon XL, VIN 3GKEC16 Z340302364;

k. One 2001 Chevrolet 3500, VIN 1GCJC 33131F172491;

l. One 2002 Continental Trailer, VIN 1ZJBE 14162M008424;

m. One 2003 Continental Trailer, VIN 1ZJBA 31343M014236;

n. One 2003 34' Donzi Vessel, VIN DNAF 60091203;

o. One 2002 Suzuki Motorcycle GSX1300RK2, VIN JS1GW71A822101513;

v. All funds on deposit and interest accrued thereto for Bank of America Account No. 3673304237;

w. All funds on deposit and interest accrued thereto for Bank of America Account No. 91000045965339;

y. All funds on deposit and interest accrued thereto for Bank of America Account No. 3677610778;

aa. All funds on deposit and interest accrued thereto for Colonial Bank Account No. 8032898606;

cc. All funds on deposit and interest accrued thereto for Interamerican Bank Account No. 450009683;

dd. All funds on deposit and interest accrued thereto for Interamerican Bank Account No. 450009139;

ee. All funds on deposit and interest accrued thereto for First Union National Bank Account No. 13122051183837;

ff. All funds on deposit and interest accrued thereto for First Union National Bank Account No. 33120270206186;

gg. All funds on deposit and interest accrued thereto for First Union National Bank Account No. 9983798061; and

hh. All funds on deposit and interest accrued thereto for Washington Mutual Bank Account No. 39300004505691.

The jury further found, with respect to Isabel Guerra, that the following were involved in or traceable to the commission of the money laundering offenses as charged in Counts 21 through 32 of the Indictment:

a. A money judgment in the amount of $248,500.00 representing checks from Ocean Medical's First Union National Bank Account No. 9983798061 to Panorama Medico and Florida Advertising Group; and

b. A money judgment in the amount of $450,051.00 representing checks from United Pharmacy Discount's First Union National Bank Account No. 2000006265339 to Panorama Medico and Florida Advertising Group.

aa. All funds on deposit and interest accrued thereto for Colonial Bank Account No. 8032898606;

cc. All funds on deposit and interest accrued thereto for Interamerican Bank Account No. 450009683;

dd. All funds on deposit and interest accrued thereto for Interamerican Bank Account No. 450009139;

ee. All funds on deposit and interest accrued thereto for First Union National Bank Account No. 13122051183837;

ff. All funds on deposit and interest accrued thereto for First Union National Bank Account No. 33120270206186;

gg. All funds on deposit and interest accrued thereto for First Union National Bank Account No. 9983798061; and

hh. All finds on deposit and interest accrued thereto for Washington Mutual Bank Account No. 39300004505691.

All right, title and interest of defendant ISABEL GUERRA in the following is hereby forfeited to the United States of America pursuant to Title 18, United States Code, Sections 982(a)(1):

a. A money judgment in the amount of $248,500.00 representing checks from Ocean Medical's First Union National Bank Account No. 9983798061 to Panorama Medico and Florida Advertising Group; and

b. A money judgment in the amount of $450,051.00 representing checks from United Pharmacy Discount's First Union National Bank Account No. 2000006265339 to Panorama Medico and Florida Advertising Group.

2. The Federal Bureau of Investigation, or any duly authorized law enforcement official, shall seize and take custody of the property identified herein above as forfeited under this order pursuant to Title 21, United States Code, Section 853(g).

3. The United States shall cause to be published at least once, in a newspaper of general circulation, notice of this Order as required by Title 21, United States Code, Section 853(n)(6). The notice shall state that any person, other than the defendant, having or claiming a legal interest in the property ordered forfeited by this order must file a petition with the Court within thirty (30) days of the final publication

of the notice or receipt of actual notice, whichever is earlier; that the petition shall be for a hearing to adjudicate the validity of the petitioner's alleged interest in the property; and that the petition shall be signed by the petitioner under penalty of perjury, shall set forth the nature and extent of the petitioner's right, title and interest in the forfeited property and shall set forth any additional facts supporting the petitioner's claim and the relief sought.

4. The United States may provide, to the extent practicable, direct written notice to any person known to have an alleged interest in the property that is subject of the Order of Forfeiture, in addition to the published notice.

5. The United States is further authorized, pursuant to Title 21, United States Code, Section 853(m) and Rule 32.2(c)(1) of the Federal Rules of Criminal Procedure, to conduct any discovery necessary, including depositions, to identify, locate or dispose of the property ordered forfeited herein or in order to expedite ancillary proceedings related to any third party petition claims filed with respect to the forfeited property.

It is further ORDERED that upon adjudication of all third-party interests, this Court will enter a Final Order of Forfeiture pursuant to Title 21, United States Code, Section 853(n) in which all interests will be addressed. If no claims are filed within 30 days of the final publication or receipt of actual notice, whichever is earlier, then pursuant to Title 21, United States Code, Section 853(n)(7), this Order shall be deemed a final order of forfeiture, and the Federal Bureau of Investigation, or any duly authorized law enforcement official, shall dispose of the property forfeited hereunder according to law.

DONE AND ORDERED at Miami, Florida this 17th day of June, 2005.

/s/ Paul C. Huck
Paul C. Huck
United States District Judge

cc: AUSA Luis M. Perez
J.C. Codias, Esq.

APPENDIX J

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No: 05-20144-CR HUCK

UNITED STATES OF AMERICA,
Plaintiff,

v.

ISABEL GUERRA,
Defendant.

NOTICE OF APPEAL

NOTICE IS HEREBY given, pursuant to Rule 4(b) of the Federal Rules of Appellate Procedure, and 18 U.S.C., § 3742, that ISABEL GUERRA, Defendant in the above-styled case, hereby appeals to the United States Court of Appeals for the Eleventh Circuit from the sentence entered herein on February 13, 2008, including the final order of forfeiture entered by the Court.

Respectfully submitted,

/s/ J.C. Codias
J.C. Codias, Esq.
Bar No: 0471577
The Four Ambassadors
825 Brickell Bay Dr. #1243
Miami, Fla. 33131
Phone (305) 372-8875
Fax (305) 372-2745

APPENDIX K

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-10873
Non-Argument Calendar
D. C. Docket No. 05-20144-CR-PCH

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ISABEL GUERRA,
Defendant-Apellant.

Appeal from the United States District Court
for the Southern District of Florida

January 9, 2009

Before ANDERSON, MARCUS and FAY, Circuit Judges.

PER CURIAM:

Isabel Guerra appeals her convictions and 70-month total sentence for one count of conspiring to defraud the United States by committing health care fraud, in violation of 18 U.S.C. § 1347, and paying kickbacks, in violation of 42 .S.C. § 1320a-7b(b)(2)(A); several counts of committing health care fraud, in violation of § 1347; one count of conspiring to launder money, in violation of 18 U.SC. § 1956(h); and several

counts of laundering money, in violation of 18 U.S.C. § 1956(a)(1)(B)(i). Specifically, Guerra was found guilty of promising in Medicare provider applications not to pay kickbacks to promote her businesses, and then nonetheless paying kickbacks to patients, patient recruiters, and doctors for submitting their Medicare claims through her businesses. Guerra challenges the sufficiency of the evidence supporting her health-care-fraud convictions; the order of forfeiture entered against her; (3) the district court's calculation of her base offense level; and (4) the district court's application of a leadership-role enhancement. For the reasons set forth below, we affirm.

I. Background and Facts

This is Guerra's second appeal to this Court. In *United States v. Medina*, 485 F.3d 1291, 1298-99 (11th Cir. 2007), we rejected Guerra's argument that she was not guilty of health care fraud because the claims submitted to Medicare were legitimate. We reasoned that, while the government had presented no evidence that any of the claims were medically unnecessary or that any of the prescriptions and products were not delivered to the patients in question, Guerra's promise not to pay kickbacks rendered those claims that post-dated the Medicare provider applications fraudulent. *Id.* However, we vacated the convictions that rested on claims that pre-dated the applications. *Id.* Also, we accepted Guerra's argument that the district court had erred in holding her accountable for the full $7,000,000 in claims submitted to Medicare, such that her 99-month total sentence was erroneous. *Id.* at 1296, 1304. We reasoned that the district court had failed is adequately explain why it used the total amount of claims submitted to Medicare as the loss amount and noted that,

because the evidence did not show that the claims were illegitimate, it appeared that Medicare had not suffered any actual or in ended loss. *Id.* We therefore vacated her sentences and remanded for findings of fact and re-sentencing. *Id.*

At re-sentencing, the district court indicated that it interpreted Medina to mean that "there is. no [health-care-fraud related] loss in the absence of . . . illegitimate prescriptions" and that, specifically as to the instant case, "[t]here was no evidence that any of the prescriptions per se were not medically necessary." The government asserted that, because the district court would not use the amount associated with the claims Medicare paid, the amount that Guerra had laundered, or $698,551, now controlled. The district court agreed. Also, Guerra objected to the probation officer's application of a four-level leadership-role enhancement, specifically arguing that the conspiracy no longer involved five or more participants since this Court vacated certain of her codefendants' conviction in *Medina*. The district court overruled this objection, reasoning that the evidence demonstrated that Guerra left her original position as a patient recruiter to b; gin her own business and ran this business from "the top of the pyramid," including putting together a "team of codefendants" to help run the "extensive operation" and making all of the important decisions with regard to the operation.

Using the aforementioned amount of $698,551, the district court set Guerra's base offense level at 20, or 6 plus 14 additional levels representing that amount, pursuant to U.S.S.G. §§ 2S1.1(a)(1) and 2B1.1(a)(2) and (b)(1)(H) The district applied a two-level enhancement, pursuant to U.S.S.G. §. 2S 1.1(b)(2 (B), because Guerra was convicted under § 1956; and a

four-level enhancement, pursuant to U.S.S.G. § 3B1.1 (a). The district court determined that with a total offense level of 26 and criminal history category of I, Guerra's guideline imprisonment range was 63 to 78 months' imprisonment. The district court indicated that, even were the guideline imprisonment range lower than what t calculated, it nevertheless would sentence Guerra within that guideline imprisonment range, because it believed such a sentence was appropriate under the 18 U.S.C. § 3553(a) factors. Specifically, the district court explained that Guerra had perpetrated "[o]ne of the most extensive frauds that [it had] dealt with" and that this fraud involved "a large number of medical beneficiaries" and a "large amount of money." The district court also stated that Guerra had "[taken] advantage of not only the Medicare system, but[,] in [its] view[,] the beneficiaries, and used those people;" had acted with the sole aim of profiting illegally, rather than helping those in need of medical care; and had "show[n] a complete disregard for the rules of [M]edicare, which is set up to help people that need help an. not to line her own pockets and her family's pockets." The district court likewise stated that it believed the only way to send "a very bad signal" for deterrence purposes was imposing a substantial sentence because, otherwise, "[s]omeone may see a large amount of money and determine that getting a light sentence may be worth it." Accordingly, the district court sentenced Guerra to a total of 70 months' imprisonment.

Regarding forfeiture, the government noted that the district court previously ordered forfeiture $9,405,114.90 and stated that the district court should re-issue this order. The district court stated that it believed the amount should be decreased because this Court had vacated certain of the convic-

tions on which the forfeiture order was based. The government asserted that the amount associated with those claims on which Guerra's affirmed health-care-fraud convictions rested, or $7,641,968.98, now controlled. Guerra responded that she "[had] no way to prove or disprove that proffer." The district court agreed with the government and ordered forfeiture of $7,641,968.98.

II. Law and Analysis

A. Convictions & Forfeiture Order

Pursuant to the law-of-the-case doctrine, an issue decided at one stage of a case is binding at later stages of the same case. *United States v. Escobar-Urrego*, 110 F.3d 1556, 1560 (11th Cir. 1997). Likewise, a "legal decision made at one stage of the litigation, unchallenged in a subsequent appeal when the opportunity existed, becomes the law of the case for future stages of the same litigation, and the parties are deemed to have waived the right to challenge that decision at a later time." *Id.* The purpose of this doctrine is "to maintain consistency and avoid reconsideration of matters once decided." *Id.* Moreover, under the mandate rule, which is simply an application of the law-of-the-case doctrine, a district court acting under an appellate court's mandate "cannot vary [the mandate], or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon a matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded." *United States v. Amedeo*, 487 F.3d 823, 830 (11th Cir. 2007). The law-of-the-case doctrine applies in all instances, save those in which. (1) the evidence on a subsequent trial was substantially different, (2) controlling authority has since *made* a

contrary decision of the law applicable to such issues, or (3) the decision was clearly erroneous and would work a manifest injustice. *Escobar-Urrego*, 110 F.3d at 1561.

Here, Guerra is barred from re-litigating the question of whether she committed health care fraud. *See Escobar-Urrego*, 110 F.3d at 1560. In *Medina*, we affirmed certain of her health-care-fraud convictions, holding that her promise not to pay kickbacks and subsequent payment of kickbacks rendered the claims she submitted to Medicare fraudulent. *See Medina*, 485 F.3d at 1298-1304. We remanded the case to the district court for the sole purpose of re-sentencing and, more specifically, making sufficient findings of fact on the amount of loss for which Guerra was responsible. *Id.* at 1304-05 Therefore, our decision that Guerra indeed committed health care fraud is binding absent appeal to the Supreme Court *See Escobar-Urrego*, 110 F.3d at 1560. Also, the district court was precluded from addressing matters outside the question of re-sentencing. *See Amedeo*, 487 F.3d at 830. Guerra has not argued, and the record otherwise does not demonstrate, that any of the exceptions to the law-of-the-case doctrine bar this conclusion. *See Escobar-Urrego*, 110 F.3d at 1561.

Guerra also is barred from challenging the forfeiture order. *See id.* Because she failed to pursue the issue of forfeiture on first appeal to this Court, she has waived the right to challenge the order now. *See id.* Although the district court altered the order at re-sentencing, the new order of forfeiture is less than that previously issued, such that it does not appear that Guerra first declined to pursue the matter on appeal because she was satisfied with the amount ordered and now wishes to pursue the matter because

she is unsatisfied. Guerra has not argued, and the record otherwise does not demonstrate, that any of the exceptions to the law-of- the-case doctrine bar this conclusion. *See Escobar-Urrego*, 110 F.3d at 1561. Accordingly, we affirm as to these issues.

B. Base Offense Level

As an initial matter, it appears the district court incorrectly calculated Guerra's base offense level. A defendant convicted of a money-laundering offense is sentenced pursuant to § 2S 1.1. Under this Guideline, a defendant who did not commit the underlying offense from which the laundered money derived, or for whom the base offense level of the underlying offense cannot be determined, is given a base offense level of eight plus the number of offense levels in the § 2B1.1 loss table that correspond to the value of the laundered funds. U.S.S.G. § 2S 1.1(a)(2). On the other hand, a defendant who committed the underlying offense, as Guerra did here, is given the base offense level for that underlying offense. U.S.S.G. § 2S1.1 (a)(1). The underlying offense applicable here, health care fraud, is sentenced pursuant to § 2B 1.1. Under this Guideline, the defendant is given a base offense level of six plus the number of offense levels in the §12B1.1 table that correspond to the amount of loss for which the defendant is responsible. U.S.S.G. § 2B 1.1 (a)(2), (b)(1).

Pursuant to § 2B 1.1, Guerra's base offense level was six. *See* U.S.S.G. § 2B1.1(a)(2). While the district court added 14 levels based on its finding that $698,551 was the amount of money laundered, Guerra actually did not merit, any additional levels from the § 2B1.1 loss table because she was not responsible for any loss to Medicare. *See Medina*, 485 F.3d at 1304-05; U.S.S.G. § 2B1.1(b)(1). The com-

mentary to this Guidelines includes no provision equating "loss" with the value of the laundered funds. *See generally* U.S.S.G. § 2B1.1, comment. Therefore, with the additional enhancements, Guerra's total offense level was 12. *See* U.S.S.G. §§ 2B1.1(a) (2); 2S 1.1(b)(2)(B); 3B1.1(a). With this total offense level and a criminal history category of I, Guerra's guideline imprisonment range was 10 to 16 months.[1] This error, however, appears to have been harmless, as discussed below.

In *United States v. Keene*, 470 F.3d 1347, 1349 (11th Cir. 2006), we Yield that a Guidelines calculation error is harmless, and thus does not require remand, when (1) the record includes evidence that the district court would have reached the same result even if it had decided the Guidelines issue the other way, and (2) the sentence imposed would be reasonable even if the Guidelines issue had been decided the other way. In that case, the defendant appealed his convictions and 120-month sentences for bank robbery, specifically challenging the application of a two-level threat-of-death enhancement under U.S.S.G.

---

[1] We note that, had Guerra not committed health care fraud, her guideline imprisonment range actually would have been much higher. In that scenario, § 2S 1.1(a)(2) would be the applicable Guideline. Pursuant to § 2S 1.1(a)(2), Guerras's base offense level would be 81 plus14, representing the $698,551 that she laundered. *See also* U.S.S.G. § 2B1.1(b)(1)(H). Therefore, with the additional enhancements applied, Guerra's total offense level would be 28. *See* U.S.S.G. §§ 2B1.1(b)(1)(h); 2S1.1(b)(2)(B); 3B1.1(a). With this total offense level and a criminal history category of I, Guerra's guideline imprisonment range would be 78 to 97 months. Thus, it appears that a defendant who does not commit the underlying crime can be subject to a far harsher sentence than a defendant who does. We find it unnecessary to address this seeming inconsistency here, however.

§ 2B3.1(b)(2)(F). *Id.* at 1348. We noted that, without the enhancement, the defendant's guideline imprisonment range was 84 to 105 months, while, with the enhancement, it was 100 to 125 months. *Id.* at 1350. We held, though, that we need not decide the Guidelines issue because any error was harmless. *Id.* We reasoned that the district court had stated that, even were its Guidelines calculations incorrect, its consideration of the § 3553(a) factors compelled the sentence imposed. *Id.* at 1349. We also reasoned that the 120-month sentence would be reasonable were it a variance from the lower guideline imprisonment, given the defendant's criminal history, leadership role, and recruitment of other participants. *Id.* at 1350. We concluded that "it would make no sense to set aside this reasonable sentence; and send the case back to the district court since it has already told us that it would impose exactly the same sentence, a sentence we would be compelled to affirm." *Id.*

In reviewing a sentence for reasonableness, we consider whether the statutory factors in § 3553(a) support the sentence in question. *Gall v. United States*, 552 U.S. __, 128 S.Ct. 586, 598-99, 169 L.Ed.2d 445 (2007). Pursuant to § 3553(a), the sentencing court shall impose a sentence "sufficient, but not greater than necessary" to comply with the purposes of sentencing listed in § 3553(4)(2), namely reflecting the seriousness of the offense, promoting respect for the law, providing just punishment for the offense, deterring criminal conduct, protecting the public from future criminal conduct by the defendant, and providing the defendant with needed educational or vocational training or medical care. *See* 18 U.S.C. § 3553(a)(2). The statute also instructs the sentencing court to consider certain factors, including the nature and circumstances of the offense and the history and

characteristics of the defendant. *See* 18 U.S.C. § 3553 (a)(1).

Here, the district court's error in calculating the guideline imprisonment ranges 63 to 78 months did not affect the outcome of the case. *See Keene*, 470 F.3d at 1349. The district court stated that, even were the guideline imprisonment range lower than what it calculated, it nevertheless would sentence Guerra within that guideline imprisonment range, because it believed such a sentence was appropriate under the § 3553(a) factors. *See id.* Also, assuming that the district court had calculated the correct 10-to-16-month guideline imprisonment range, Guerra's 70-month sentence would not fail reasonableness review. *See id.* The district court explicitly stated at sentencing that it had considered the § 3553(a) factors. The district court then discussed at length the seriousness of Guerra's offense, Guerra's characteristics, and the need to impose a substantial sentence to deter future crimes of this nature. *See* 18 U.S.C. § 3553(a)(1), (2). All of which is amply supported in the record. Given these factors, the upward variance imposed from the correct guideline imprisonment range, though large, was not unreasonable. *See* 188 U.S.C. § 3553(a)(1), (2). Accordingly, because the district court's error was harmless, we affirm as to this issue.

C. Leadership-Role Enhancement

We review a district court's application of a leadership-role enhancement for clear error. *United States v. Rendon*, 354 F.3d 1320, 1331 (11th Cir. 2003). Pursuant to § 3B 1.1(a), a district court can increase a defendant's base offense level by four "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants or was

otherwise extensive." Pursuant to the commentary to § 3B 1.1(a), the factors the district court should consider in determining whether a defendant held a leadership role in a conspiracy include "the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others:" U.S.S.G. § 3B1.1, comment. (n.4). Also, pursuant to the commentary, there can be more than one leader or organizer in a conspiracy. *Id.*

Here, the district court did not clearly err in applying a four-level enhancement, pursuant to § 3B1.1(a). *See Rendon*, 354 F.3d at 1331. First, it is of no import that we vacated the convictions of certain of Guerra's co-conspirators, as the record demonstrates that the conspiracy was "otherwise extensive" since it involved submitting millions of dollars in claims to Medicare and required the aid of many beneficiaries. *See* U.S.S.G. § 3B1.1(a). Also, the record demonstrates that Guerra was the person who founded and owned 50% interests in the businesses in question, such that she had a higher claim in the profits derived from the conspiracy than her co-conspirators. *See* U.S.S.G. § 3B 1.1, comment. (n.4). Accordingly, we affirm at to this issue. *See Rendon*, 354 F.3d at 1331.

AFFIRMED.

APPENDIX L

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-10873-AA

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ISABEL GUERRA,
Defendant-Apellant.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

BEFORE: ANDERSON, MARCUS and FAY, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en bans (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible] Fay
United States Circuit Judge

APPENDIX M

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed FEB 09, 2009]

No. 08-10873-AA

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ISABEL GUERRA,
Defendant-Apellant.

Appeal from the United States District Court
for the Southern District of Florida

ORDER:

( ) The motion of Appellant, Isabel Guerra, for (x) stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

(✓) The motion of Appellant, Isabel Guerra, for (x) stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including April 9, 2009, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an

order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ [Illegible] Fay
United States Circuit Judge

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

For rules and forms visit
www.call.uscourts.gov

February 09, 2009

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 08-10873-AA
Case Style: USA v. Isabel Guerra
District Court Number: 05-20144 CR-PCH

The following action has been taken in the referenced case:

The enclosed order has been ENTERED.

Sincerely,

THOMAS K. KAHN, Clerk
Reply To: Shirley M. Brown (404) 335-6170

No. 08-1266

In the Supreme Court of the United States

ISABEL GUERRA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
MICHAEL A. ROTKER
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that petitioner was barred from challenging the forfeiture order entered against her in her second appeal, because the order was final as to her at the time of her first appeal, and she failed to challenge the order at that time.

2. Whether the health care money judgment portion of the forfeiture order violates the Excessive Fines Clause of the Eighth Amendment.

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In the Supreme Court of the United States

No. 08-1266

ISABEL GUERRA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 117a-127a) is not published in the Federal Reporter but is reprinted in 307 Fed. Appx. 283. A prior relevant opinion of the court of appeals (Pet. App. 76a-99a) is reported at 485 F.3d 1291.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 2009. A petition for rehearing was denied on March 16, 2009 (Pet. App. 128a). The petition for a writ of certiorari was filed on April 8, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner

was convicted on 15 counts of health care fraud, in violation of 18 U.S.C. 1347; one count of conspiracy to defraud the United States, commit health care fraud, and pay kickbacks, in violation of 18 U.S.C. 371; one count of conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h); and 11 counts of money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i). She was sentenced to 99 months of imprisonment and ordered to forfeit all right, title, and interest in certain property and to pay a money judgment in excess of $9.4 million dollars. The court of appeals vacated three of petitioner's health care fraud convictions, affirmed the remaining convictions, and vacated and remanded for resentencing. Pet. App. 76a-99a. On remand, the district court sentenced petitioner to 70 months of imprisonment and reduced the health care money judgment component of the forfeiture order to $7.6 million. *Id.* at 100a-108a. The court of appeals affirmed. *Id.* at 117a-127a.

1. This case concerns a multi-defendant conspiracy to obtain Medicare payments through kickbacks and fraud. Petitioner was a Medicare provider who owned 50% stakes in two companies—Ocean Medical Supply (Ocean), a medical equipment supplier, and United Pharmacy (United), a pharmacy. Through Ocean and United, petitioner engaged in an elaborate scheme to pay kickbacks to entice patients to submit their Medicare claims through Ocean and United. Pet. App. 78a-79a.

Before petitioner became a Medicare provider through Ocean and United, she had worked as a patient recruiter, bringing patients to a certain pharmacy in exchange for illegal kickbacks. Once she received her own Medicare provider number, she began directing

patients to her own businesses, Ocean and United. Pet. App. 78a.

When she became a Medicare provider, petitioner signed various documents, including a certification that she would abide by all relevant Medicare regulations. Those regulations included 42 C.F.R. 424.57(c)(1), which specifies that the provider must comply with all applicable federal and state licensure and regulatory requirements. One of those requirements is to refrain from paying doctors and patients kickbacks in violation of federal law. Pet. App. 79a, 85a.

As part of the conspiracy, petitioner paid kickbacks to a variety of patients, doctors, patient recruiters, and businesses so that they would use her companies as their Medicare providers. Petitioner also used an advertising company owned by Mauricio Abanto to launder money obtained through the conspiracy. Petitioner or her secretary would provide Abanto with personal checks signed by petitioner, and he would supply cash in return, less a substantial processing fee. Pet. App. 79a-80a.

2. A federal grand jury in the Southern District of Florida returned a 33-count indictment charging petitioner and two co-conspirators with conspiring to defraud the United States, commit health care fraud, and pay kickbacks, in violation of 18 U.S.C. 371; conspiring to commit money laundering, in violation of 18 U.S.C. 1956(h); money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i); and health care fraud, in violation of 18 U.S.C. 1347. Pet. App. 1a-11a. The indictment also sought forfeiture of certain property traceable to the conspiracy, health care fraud, and money-laundering offenses. *Id.* at 11a-24a. Following a lengthy trial, a

jury found petitioner and her co-defendants guilty on all charges submitted to them. *Id.* at 81a.[1]

Pursuant to Federal Rule of Criminal Procedure 32.2(b)(4), petitioner requested a separate trial on the issue of forfeiture. The jury returned a verdict of forfeitability. As relevant here, the jury's special verdict found that $9,405,114.90 constitutes or was derived, directly or indirectly, from gross proceeds traceable to petitioner's health care fraud. Pet. App. 110a. The $9.4 million amount was the total amount that United and Ocean were paid from Medicare for fraudulent claims during the conspiracy. Presentence Investigation Report para. 45 (PSR).

The district court then calculated the amount of loss for purposes of determining petitioner's advisory Sentencing Guidelines range. The court determined that all of the claims submitted by Ocean and United to Medicare were fraudulent, and it therefore calculated the amount of loss as the $9.4 million in fraudulent Medicare claims. Pet. App. 81a. That loss amount resulted in a 20-level increase in her base offense level and resulted in an advisory Guidelines range of 121 to 151 months of imprisonment. The district court sentenced petitioner to 99 months of imprisonment. *Ibid.*

In addition, the district court ordered petitioner to forfeit her right, title, and interest in certain specific property, and imposed a $9.4 million money judgment against her. Pet. App. 33a (forfeiture portion of the judgment).[2]

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[1] During the trial, the district court entered a judgment of acquittal on four of the 19 health care fraud counts and on one conspiracy count. Pet. App. 81a n.2.

[2] The court also imposed two other money judgments—one for money laundering as to Ocean and one for money laundering as to United.

3. Petitioner filed a notice of appeal from the judgment of conviction. While her appeal was pending, third-party claims were filed against the assets that were the subject of the order of forfeiture. The filing of these claims required the district court to conduct an ancillary proceeding to resolve them. See Fed. R. Crim. P. 32.2(c)(1). Before resolving the third-party claims, the district court had entered a final order of forfeiture. Pet. App. 35a-40a. The district court then *sua sponte* vacated its final order, recognizing that the order had been prematurely entered because the court had not yet resolved the third-party claims. *Id.* at 41a-42a.

On appeal, petitioner argued that the evidence was not sufficient to support her convictions and that the district court incorrectly calculated the loss amount for purposes of the advisory Sentencing Guidelines range and improperly enhanced her sentence based on that loss amount because it was not proved to the jury. Pet. App. 43a-44a (statement of issues); *id.* at 67a-68a (summary of the arguments); 05-14864 Pet. C.A. Br. 43-47 (argument section of petitioner's brief). Although petitioner's brief included some passing references, in the statement of the facts, to the circumstances that culminated in the order of forfeiture, petitioner raised no legal challenge to the forfeiture order.

4. The court of appeals affirmed all but three of petitioner's convictions, vacated her sentence, and remanded for resentencing. Pet. App. 76a-99a. The court first rejected petitioner's argument that she could not be found guilty of Medicare fraud under 18 U.S.C. 1347 unless the government proved that all of the goods and

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See Pet. App. 113a. Petitioner has not challenged those components of the forfeiture order, and they are not at issue here.

services obtained by patients were not medically necessary. Pet. App. 82a-89a. The court explained that, although "paying kickbacks alone is not sufficient to establish health care fraud," petitioner was guilty of health care fraud because she "ma[de] * * * knowing false or fraudulent representation[s] to Medicare" by signing various documents promising to follow all pertinent rules and regulations while planning to continue paying illegal kickbacks. *Id.* at 84a-85a. The court therefore affirmed all of petitioner's convictions for health-care fraud (12 of 15 counts) that were based on events that took place after she signed the Medicare provider certifications. *Id.* at 86a, 89a. The court also upheld petitioner's convictions for conspiracy to commit money laundering, money laundering, and conspiracy to pay kickbacks, finding that ample evidence supported the jury's verdict. *Id.* at 89a-93a.

The court of appeals then vacated petitioner's sentence and remanded for resentencing. Pet. App. 95a-99a. The court recognized that "[t]he district court needs only t[o] make a reasonable estimate of the loss amount," but noted that "the district court made no factual findings as to the amount of the loss," so that the court could not "determine what factual basis was used to reach the conclusion that every claim submitted to Medicare constituted loss." *Id.* at 97a, 98a. Without further explanation by the district court, the court of appeals determined that it could only affirm a loss amount of $11,820, which is the amount of claims covered by the 12 convictions for health care fraud upheld by the district court. *Id.* at 98a; see *id.* at 7a-8a.

5. On remand, the district court calculated an advisory Sentencing Guidelines range of 63 to 78 months of imprisonment and sentenced petitioner to 70 months of

imprisonment. Pet. App. 103a, 119a-120a. In arriving at the advisory Guidelines range, the court used the Guideline for money laundering and used a loss amount of $698,551, which corresponded to the amount of money petitioner laundered. *Id.* at 119a; see 2/13/2008 Resentencing Tr. 17-22. The court also specifically stated that even if a lower Guidelines range applied, it would sentence petitioner to 70 months of imprisonment because she had perpetrated "[o]ne of the most extensive frauds that [it had] dealt with," which involved "a large number of medical beneficiaries" and a "large amount of money," and she showed "a complete disregard for the rules of [M]edicare, which is set up to help people that need help an[d] not to line her own pockets." Pet. App. 120 (quoting district court; brackets in original).

The court also incorporated its earlier forfeiture order into the amended judgment and reduced the health care money judgment component of that order to $7,641,968.98. Pet. App. 108a; see 2/13/2008 Resentencing Tr. 29-34. The court acknowledged that petitioner likely waived any challenge to the forfeiture order "since it was not raised in the first instance." *Id.* at 30; see *id.* at 32 (agreeing that the forfeiture order probably "should stand in place because it was not a point of contention on the appeal"). But the district court decided, in an abundance of caution, to reduce the money judgment amount to account for the court of appeals' vacatur of three of petitioner's convictions. Pet. App. 108a, 120a-121a; 2/13/2008 Resentencing Tr. 30-32. The court therefore reduced the health care money judgment amount to $7.6 million, which is the amount of fraudulent claims petitioner submitted to Medicare after petitioner signed the Medicare provider certifications until the conspiracy ended. *Id.* at 30-32. When the $7.6 mil-

lion figure was suggested to the court by the government at resentencing, petitioner's counsel stated that he "had no way to prove or disprove that proffer." Pet. App. 121a.

Petitioner appealed, arguing that the evidence was insufficient to support her convictions, that the forfeiture order was excessive, and that the district court incorrectly calculated her base offense level and erred in imposing a leadership role enhancement. 08-10873 Pet. C.A. Br. 29-54; see Pet. App. 118a.

6. The court of appeals affirmed. Pet. App. 117a-127a. The court first held that petitioner "is barred from re-litigating the question of whether she committed health care fraud" under the law of the case doctrine, because the court of appeals had affirmed her convictions in her first appeal. *Id.* at 122a.

The court then held that petitioner "also is barred from challenging the forfeiture order." Pet. App. 122a-123a. By "fail[ing] to pursue the issue of forfeiture on first appeal," petitioner "waived the right to challenge the order" in her second appeal. *Id.* at 122a. The court acknowledged that the district court had modified the order upon resentencing, but also noted that "the new order of forfeiture is less than that previously issued" and that "it does not appear that [petitioner] first declined to pursue the matter on appeal because she was satisfied with the amount ordered and now wishes to pursue the matter because she is unsatisfied." *Id.* at 122a-123a. The court also stated that petitioner had not suggested that any exceptions to normal waiver principles apply. *Id.* at 123a.

Finally, the court affirmed petitioner's sentence. Pet. App. 123a-127a. It upheld the district court's imposition of a leadership role enhancement, *id.* at 126a-127a,

but determined that the district court used an incorrect base offense level, *id.* at 123a-124a. The court of appeals determined that that error as harmless, however, because the district court made clear that it would sentence petitioner to 70 months of imprisonment regardless of her advisory Guidelines range and because the sentence imposed was reasonable in light of the factors contained in 18 U.S.C. 3553(a). Pet. App. 124a-126a.

ARGUMENT

Petitioner contends (Pet. 22-28) that the court of appeals erred in determining that she waived any challenge to the forfeiture order and that the health care money judgment portion of the forfeiture order is excessive. Petitioner does not contend that the court of appeals' decision conflicts with any decision of this Court or any other court of appeals. The petition raises only fact-bound, case-specific challenges to the forfeiture order, and those challenges do not merit this Court's review. See, *e.g.*, *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts.").

1. Petitioner contends (Pet. 22-26) that the court of appeals erred in holding that she could not challenge her petition for review, for two reasons. First, she argues (Pet. 22-23) that she could not have appealed the forfeiture order earlier because it was not final until after she filed her appellate brief. Second, she argues (Pet. 24-26) that she was entitled to challenge the forfeiture order in her second appeal because the district court reduced the money judgment portion of the order. Neither argument warrants this Court's review.

a. An order of criminal forfeiture is part of the criminal punishment. See *Libretti* v. *United States*, 516 U.S.

29, 39-41 (1995). Accordingly, "the order of forfeiture * * * must be made a part of the sentence and be included in the judgment." Fed. R. Crim. P. 32.2(b)(3).

Federal Rule of Criminal Procedure 32.2 provides a process for imposing an order of forfeiture. After a guilty verdict or guilty plea on a count in which forfeiture is sought, the district court must determine what property is subject to forfeiture. Fed. R. Crim. P. 32.2(b)(1). That determination "may be based on evidence already in the record," or "if the forfeiture is contested, on evidence or information presented by the parties at a hearing after the verdict or finding of guilt." *Ibid.* If the district court finds that property is subject to forfeiture, it "must promptly enter a preliminary order of forfeiture setting forth the amount of any money judgment or directing the forfeiture of specific property without regard to any third party's interest in all or part of it." Fed. R. Crim. P. 32.2(b)(2). At that point, the Attorney General is authorized to seize the property subject to forfeiture. Fed. R. Crim. P. 32.2(b)(3). The order of forfeiture is then made part of the defendant's sentence and "becomes final as to the defendant." *Ibid.*; see *United States* v. *Petrie*, 302 F.3d 1280, 1284 (11th Cir. 2002) (Rule 32.2(b)(3) procedure "contemplates final disposition of forfeiture issues, as regards a defendant, at the time of sentencing"), cert. denied, 538 U.S. 971 (2003).

If a third party later asserts an interest in the property to be forfeited, the district court conducts an ancillary proceeding to adjudicate the third party's rights in the property. Fed. R. Crim. P. 32.2(c). The ancillary proceeding, however, "is not part of [the defendant's] sentencing." Fed. R. Crim. P. 32.2(c)(4); see 21 U.S.C. 853(n)(2) (barring the defendant from contesting the

forfeiture in the ancillary proceeding). Following the completion of the ancillary proceedings, the district court enters a "final order of forfeiture" by amending the preliminary order of forfeiture, as necessary, to account for any third-party rights. See Fed. R. Crim. P. 32.2(c)(2).

Applying those settled rules to this case, petitioner's forfeiture order became final and appealable at the time of the original judgment. The jury found petitioner guilty on June 9, 2005. Pet. App. 110a. The jury also returned a verdict of forfeitability. *Ibid.* On June 17, 2005, the district court entered a preliminary order of forfeiture. *Id.* at 35a; see Fed. R. Crim. P. 32.2(b)(1)-(2) (directing entry of a "preliminary order of forfeiture"). At sentencing, the court pronounced forfeiture as to various items, including the $9.4 million and incorporated that ruling in the judgment. Pet. App. 33a, 81a. At that point, the preliminary order of forfeiture constituted a final, appealable judgment concerning *petitioner*'s rights to the forfeited property. See Fed. R. Crim. P. 32.2(b)(3) ("At sentencing * * * the order of forfeiture becomes final as to the defendant.").

The forfeiture order's "preliminary" character meant only that the order was subject to modification if and when a third-party claimant filed a petition asserting an interest in the property. See Fed. R. Crim. P. 32.2(c). Although such an order of forfeiture is preliminary as to third parties, it is final as to the defendant at the time of sentencing. Fed. R. Crim. P. 32.2(b)(2); see, *e.g.*, *United States* v. *De Los Santos*, 260 F.3d 446, 448 (5th Cir. 2001).[3]

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[3] Petitioner's reliance (Pet. 22-23) on the district court's November 2005 order vacating its final order of forfeiture is misplaced. The dis-

Because the preliminary order of forfeiture was final as to petitioner once the judgment was entered, if she wished to appeal that order, she was required to do so at the same time that she appealed the judgment of conviction. Fed. R. Crim. P. 32.2(b)(3), advisory comm. notes (2000) ("Because the order of forfeiture becomes final as to the defendant at the time of sentencing, [the defendant's] right to appeal from that order begins to run at that time."); see, *e.g.*, *De Los Santos*, 260 F.3d at 448; *United States* v. *Christunas*, 126 F.3d 765, 768 (6th Cir. 1997). But petitioner did not appeal at that time. Her briefs made passing reference to the imposition of the forfeiture order, but they did not argue that the forfeiture order was entered in error. See Pet. App. 82a (listing arguments petitioner presented on appeal); *id.* at 43a-44a, 67a-68a (statement of issues and summary of argument in petitioner's brief). Petitioner therefore abandoned any challenge to the forfeiture order in her first appeal. See, *e.g.*, *Rowe* v. *Schreiber*, 139 F.3d 1381, 1382 n.1 (11th Cir. 1998) (collecting cases holding that an appellant's failure to present argument and authorities in support of an issue results in abandonment of the issue); see also Fed. R. App. P. 28(a)(9)(A) (requiring a party to include, in the "argument" section, her "conten-

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trict court vacated its prior order because third-party claimants had alerted the district court that it would need to conduct ancillary proceedings to resolve their claims to the forfeited property. Pet. App. 41a-42a. Those ancillary proceedings have no bearing on the finality of the preliminary order of forfeiture as to the defendant, because they concern only the rights of third parties to property in which the defendant no longer has any rights. Fed. R. Crim. P. 32.2(c); see 21 U.S.C. 853(n)(2) (defendant may not contest the forfeiture in the ancillary proceeding); Fed. R. Crim. P. 32.2(c)(4) (ancillary proceeding "is not part of [the defendant's] sentencing").

tions and the reasons for them, with citations to the authorities and part of the record").

b. Petitioner next contends (Pet. 24-26) that, even if she failed to challenge the initial forfeiture order, she was entitled to contest the amended forfeiture order entered following the remand. Because the forfeiture order was final at the time of the initial judgment, and petitioner did not challenge it, the court of appeals determined that she waived any challenge to the order. Pet. App. 122a. The court also noted that petitioner failed to explain why any exception to normal waiver principles would apply. *Id.* at 123a. The court of appeals' fact-specific holding does not warrant this Court's review.

2. Petitioner also argues (Pet. 26-28) that the amount of the money judgment in the forfeiture order is so excessive that it violates the Excessive Fines Clause of the Eighth Amendment. The court of appeals did not consider that argument because it determined that petitioner waived the issue in her first appeal and she failed to explain why an exception to traditional waiver principles applied in her second appeal. Pet. App. 122a-123a. This Court ordinarily does not address issues that were not passed upon by the courts below. See, *e.g.*, *NCAA* v. *Smith*, 525 U.S. 459, 470 (1999).

In any event, the forfeiture order does not impose an unconstitutionally excessive fine. The money judgment amount corresponds to the gross proceeds of petitioner's conspiracy. As petitioner recognizes (Pet. 27), a "punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." *United States* v. *Bajakajian*, 524 U.S. 321, 335 (1998). Here, the district court ordered forfeiture of the proceeds of petitioner's health care fraud, and the forfei-

ture of proceeds is never grossly disproportionate to the gravity of the offense, because it "simply parts the owner from the fruits of the criminal activity." *United States* v. *Alexander*, 32 F.3d 1231, 1236 (8th Cir. 1994); cf. *United States* v. *Ursery*, 518 U.S. 267, 298 (1996) (Stevens, J., concurring in the judgment in part and dissenting in part) ("forfeiture of * * * proceeds, like the confiscation of money stolen from a bank, does not punish" a defendant for double jeopardy purposes).

The $7.6 million figure represents the proceeds of petitioner's conspiracy to commit health care fraud. As the court of appeals explained, petitioner committed 12 counts of health care fraud by signing various documents promising to follow all pertinent rules and regulations while planning to continue paying illegal kickbacks. Pet. App. 84a-85a. The amount of Medicare claims submitted by petitioner (and paid by the government) from the time petitioner knowingly signed the Medicare provider certifications until the conspiracy ended is $7.6 million. 2/13/2008 Resentencing Tr. 30-32. The money judgment amount therefore directly reflects the gravity of petitioner's conspiracy offense.

Petitioner contends (Pet. 28) that the $7.6 million figure is inappropriate because the government did not show that the goods and services obtained were not medically necessary, *i.e.*, that petitioner caused a loss to Medicare. But whether or not petitioner caused a loss to Medicare, she did obtain money fraudulently. See, *e.g.*, *United States* v. *Foley*, 508 F.3d 627, 633 (11th Cir. 2007) (explaining that "forfeiture and loss * * * need not be calculated identically" because "[f]orfeiture is a penalty imposed on a criminal independent of any loss to the crime victim") (internal quotation marks omitted), cert. denied, 128 S. Ct. 1912 (2008). The gravamen of

petitioner's offense was conspiring to obtain Medicare payments through fraud, not conspiring to obtain payments for services that were medically unnecessary. See Pet. App. 84a-85a. The $7.6 million amount corresponded to the proceeds fraudulently obtained during the course of the conspiracy. As the district court explained, "[e]ven though 7.6 million dollars was not a loss in the sense that the Government paid claims that may not have been medically necessary, it certainly was fraudulent and [the claims] would not have been paid" if the government knew that petitioner was paying kickbacks. 2/13/2008 Resentencing Tr. 36.

Petitioner also suggests (Pet. 21, 28) that the money judgment amount should have been limited to $11,280. She is mistaken. The $11,280 figure relates only to the 12 substantive health-care fraud counts sustained on appeal by the court of appeals; it does not account for the conspiracy charge, and that charge supports the $7.6 million amount.

Further, the court of appeals did not hold in the first appeal that the money judgment amount must be limited to $11,280. Instead, it stated—in the context of a challenge to the calculation of the advisory Sentencing Guidelines range, not a challenge to the forfeiture order—that "the district court made no factual findings as to the amount of loss" and that the court could therefore only affirm a loss amount of $11,280 (the amount of claims paid for the 12 convictions for health care fraud) without further explanation from the district court. Pet. App. 96a, 98a. On remand, the district court provided an explanation for the $7.6 million money judgment amount, 2/13/2008 Resentencing Tr. 30-36, and that amount clearly relates to the gravity of petitioner's offense, because it is the amount of fraudulent claims sub-

mitted to Medicare during the course of the conspiracy. And, when asked about the $7.6 million figure, petitioner's counsel stated that he "had no way to prove or disprove that proffer." Pet. App. 121a. The money judgment portion of the district court's forfeiture order therefore does not violate the Eighth Amendment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
LANNY A. BREUER
Assistant Attorney General
MICHAEL A. ROTKER
Attorney

JULY 2009

(3)

No. 08-1266

IN THE

Supreme Court of the United States

ISABEL GUERRA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONER REPLY TO BRIEF IN OPPOSITION

JULIO C. CODIAS
Counsel of Record
The Four Ambassadors
925 Brickell Bay Drive
Tower 3, Suite 1243
Miami, Florida 33131
(305) 372-8875

Counsel for Petitioner

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QUESTIONS PRESENTED FOR REVIEW

I. Whether a criminal defendant should be severely and unconstitutionally penalized with a forfeiture order that had been vacated by the district court and not reinstated until after the defendant had filed her brief on appeal with the 11th Circuit Court of Appeals?

II. Whether the ruling from the 11th Circuit Court of Appeals sustaining the illegal forfeiture because "it had not been appealed" was arbitrary and capricious and in conflict with its own rulings on the effect a vacatur has on a criminal sentence once the original order of forfeiture has been vacated?

III. Whether the criminal forfeiture order entered is constitutionally defective since criminal forfeitures have been held to be a fine subject to application of the eighth amendment's excessive fines clause and whether the question of whether a fine is constitutionally excessive is subject to de novo review. U.S. Const., Amend. 8; *United States v. Bajakajian*, 524 u.s. 321, 336 n. 10 (1998), citing *Ornelas v. United States*, 517 U.S. 690, 697 (1996) and *Alexander v. United States*, 509 U.S. 544 (1993); and *Austin v. United States*, 509 U.S. 602 (1993).

LIST OF INTERESTED PARTIES

CERTIFICATE OF INTERESTED PERSONS

Undersigned counsel for the Defendant-Appellant hereby certifies that the following is a complete list of persons and entities who have an interest in the outcome of this case:

Trial Attorney	:	AUSA Luis M. Perez
Trial Attorney	:	AUSA Luis M. Perez
Petitioner	:	Isabel Guerra
Appellate Attorney	:	AUSA Anne R. Schultz
Magistrate Judge	:	Honorable Ted E. Bandstra
District Court Judge	:	Honorable Paul C. Huck
Attorney for Petitioner	:	J. C. Codias, Esq.
Acting Solicitor General	:	Edwin S. Kneedler

This case is a criminal case and there are no parent companies or nonwholly owned subsidiaries.

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IN THE

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No. 08-1266

ISABEL GUERRA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONER REPLY TO BRIEF IN OPPOSITION

GROUNDS FOR JURISDICTION

This matter was originally decided by a federal jury on June 29, 2005, who found Petitioner guilty on all counts in the indictment and was sentenced on August 25, 2005. The sentence, conviction and order of forfeiture was then appealed to the United States Court of Appeals for the Eleventh Circuit, whom vacated the sentence imposed on Petitioner on May 11, 2007 and remanded the case for re-sentencing.

Petitioner was re-sentenced on February 13, 2008 and the sentence, conviction and order of forfeiture,

was then appealed to the United States Court of Appeals for the Eleventh Circuit. The 11th Circuit ruled on this appeal on January 9, 2009 and a Petition for Rehearing In Banc was timely filed, and treating the Petition as a petition for rehearing by the panel, same was denied on March 16, 2009.

The mandate of this ruling has been stayed pending ruling from this Honorable Court on this Petition for Writ of Certiorari. Jurisdiction in this Honorable Court lies pursuant to 28 USC §1254.

STATUTORY PROVISIONS INVOLVED

This is an action involving Title 18 USC Sections 2; 371; 1347; 1956; and 982; Title 31 §§5324(a)(3) and §5317 and Title 42§1320a-7b(b). The pertinent texts are set forth in the appendix.

REPLY BRIEF OF PETITIONER TO GOVERNMENT'S BRIEF IN OPPOSITION

Comes now Petitioner Isabel Guerra and respectfully replies to the government's brief in opposition.

On page 1 the government admits that after the vacatur of the original sentence and order of forfeiture by the court of Appeals the district court entered a new and different sentence and a new and different order of forfeiture. The government admits this is a de-novo proceeding *but is silent as to the effect of a vacatur of a criminal sentence*.

The government is also silent as to the cases by the 11th Circuit Court of Appeals and by this Honorable Supreme Court defining the effect of a vacatur of a criminal sentence.

A criminal sentence is a package of sanctions which may or may not include forfeiture. The vacatur of

May 11, 2007 rendered the forfeiture order of August 25, 2005 invalid since this forfeiture order was part of the criminal sentence imposed on Isabel Guerra on August 25, 2005.

The new order of forfeiture entered on February 13, 2008 was part of a new sentence and was timely and fully appealed by Ms. Guerra to the 11th Circuit on Appeal 08-10873 since this subsequent order had not been vacated by the district court.

De-Novo. Forfeiture is a component of a criminal sentence. (United States Sentencing Guidelines §5E1.4). *See also* 18 U.S.C. §§3554; 1962; 1963; 3681; 3682; and 21 U.S.C. §853.

In *U.S. v. Tamayo*, 80 F.3d 1514, at 1520 (C.A.11 Fla. 1996) the 11th Circuit explained, that under this holistic approach, when a criminal sentence is vacated, *it becomes void in its entirety*; the sentence—including any enhancements—has "been wholly nullified and the slate wiped clean." *Id.*; *U.S. v. Grant*, 397 F.3d 1330, at 1336 (C.A.11 Ga. 2005) (The law of this circuit, as well as that of six other circuits is, as a general matter, that when a sentence is remanded on appeal, the sentencing process commences again *de novo*); *Hall v. Moore*, 253 F.3d 624, at 628 (C.A.11 Fla. 2001); *U.S. v. Ramos*, 130 Fed.Appx. 415 (C.A.11 Fla. 2005)(The district court was permitted to consider the objections on remand because they were timely and because the sentencing process had started anew).

This Honorable Supreme Court has ruled on the effect a vacatur has on a criminal sentence in *North Carolina v. Pearce*, 395 U.S. 711, 721, 89 S.Ct. 2072, 2078, 23 L.Ed.2d 656 (1969).

The 11th Circuit in *U.S. v. Oliver*, 941 F.Supp. 1109, at 1118 (M.D. Ala. 1996) stated that upon a successful collateral attack, a district court "... shall vacate and set the judgment aside and shall discharge the prisoner or re-sentence him or grant a new trial or correct the sentence as may appear appropriate." 28 U.S.C. § 2255.

In this case the 11th Circuit simply ignored all its precedent case law and ruled in violation of its own previous rulings.

On item 1 on page 2 the government asserts Ms. Guerra had a "50% interest two companies-Ocean Medical and United Pharmacy". This is in error. Ms. Guerra was the sole owner of Ocean Medical since 1995 and there was no evidence of any health care fraud whatsoever in relation to Ocean Medical.

On or about April 23, 2003, a civil case was started by the government by requesting a temporary restraining order and injunction against all the real and personal assets of Isabel Guerra, her mother Mrs. Isabel Santos, and her employee Isabel Canepa.

The caption for the civil case was *United States v. Brickell Orthopedics, et al.*, with Case No: 03-21059-Civ-Jordan/Brown. Isabel Guerra's sworn deposition in the civil case was taken on July 23, 2004. This deposition was filed by in the subsequent criminal case. (R.doc. #205)

The indictment. Isabel Guerra was indicted on or about February, 2005. Upon learning that an indictment had been returned against her, she voluntarily surrendered to the FBI offices on Friday, February 25, 2005.

It was clear from the indictment that to offer and pay remuneration to induce Medicare beneficiaries to become legitimate patients of Ocean Medical and of her 50% portion of United Pharmacy was a separate and different violation than that of health care fraud (42 USC 1320 6(b)(1)(2) and not 18 USC §1347) The 11th Circuit Court of Appeals chose not to rule on this issue.

The 19 Medicare Fraud Counts. Isabel Guerra was charged with 19 identifiable charges of Medicare fraud. Four of these counts were dismissed by the trial court and the surviving 15 health care fraud counts in the indictment amounted to $15,820.

The six (6) counts imputed to Isabel Guerra at Ocean Medical, namely, counts 2, 4, 7, 12, 15, and 16, were all prescriptions from a Dr. Pedro Cuni. The total amount of the six (6) Ocean Medical counts was $7,000. ®. doc. #229 p.9) The sought forfeiture was based on these "health care fraud" counts.

Witness FBI S/A Wendy Evans indicated that Ocean Medical was servicing or had serviced 478 Medicare beneficiaries; (R.doc.#162 p.38) that Ocean Medical had been in business since 1995 but she had no evidence of any Medicare fraud during all these years.

On page 2 the government asserts that Ms. Guerra received referral fees from a pharmacy by sending her patients from Ocean Medical for service of their prescriptions. This dubious allegation was based on a jail house witness named Ruben Martinez, who pleaded guilty in an unrelated Medicare case used to own a pharmacy, and was convicted of health care fraud along with his entire family whom were all also convicted of health care fraud.

Martinez was trying to get sentence reductions for himself and his other family members for testifying at different trials. (R.doc.#157, pp.47-51)

Martinez also testified that everything at his pharmacy was legal except the aerosol medication, (R.doc.#156, p.33)and that he had a patient file for each patient serviced by his pharmacy (p.34).

Also, that the referred beneficiaries were all legitimate Medicare patients and the prescription was always dispensed as ordered by the patients' physician. (pp.42, 51) Martinez then stated that Ms. Guerra brought a few prescriptions to his pharmacy in the year 2000, and had received a commission from Martinez. (p. 41) However, Martinez was silent as to whether any of these alleged prescriptions were for aerosol medication.

When asked for the full name of Isabel Guerra, and to identify Isabel Guerra at trial, Martinez seemed confused. (R.doc.#156, pp. 45-47; doc.#157, p.27)

When asked to produce the *computer printout* of names of the alleged patients referred by Isabel Guerra to him in the year 2000, he stated that he did not have them. (pp. 55). When asked to produce the names of the alleged patients referred by Isabel Guerra for aerosol medication in the year 2000, *again* he stated that he did not have them. (p.57) Martinez acknowledged that every time a patient is serviced by a pharmacy that a patient chart is created by that pharmacy with all the information about the patient but when asked to produce such patient charts for the jury's review, the witness indicated that he could not bring them because all those patient charts were at the pharmacy. (R.doc.# 157, p. 21)

Martinez also testified he had an employee by the name of Cecilia Rodriguez, who actually worked at the pharmacy's computer, and whom later on opened her own pharmacy.(R.doc.#156, pp.43-44)

The government did not produce one single item of evidence about this allegation of Martinez, although supposedly in possession of all the records of Martinez's pharmacy.

Government witness Cecilia Rodriguez, worked for Ruben Martinez at his pharmacy, Lolita's pharmacy, since November 1997, and had known Martinez for about 25 years. Rodriguez was the pharmacy technician and in charge of inputting all the information into Martinez's pharmacy computers. She also personally knew all the many patient recruiters that Martinez had, because they would personally bring the prescriptions directly to her.

Rodriguez, who was testifying in exchange for possible favors from the government, did not once mention Isabel Guerra as ever having been a recruiter for Martinez's pharmacy; nor being in Lolita's pharmacy's computers; nor ever bringing one single aerosol prescription to her at Lolita's pharmacy; nor of her having any arrangement whatsoever with Isabel Guerra at Martinez's pharmacy.

Rodriguez acknowledged that all prescriptions were legitimate; from legitimate doctors, and that in every case the medication was actually dispensed to the Medicate patient. (R.doc. 157, pp129-131)

Not one single prescription was identified nor introduced into evidence as being the subject matter of any fraud whatsoever in reference to Isabel Guerra.

On page 4 the government admits the repeated efforts by Petitioner Guerra challenging the order of forfeiture stating that the original order of forfeiture of $9.4 million was proper since it was based on the "loss" to Medicare caused by Ms. Guerra.

Post-trial proceedings.

When questioned by the district court, the government admitted it did not have one single case from the 11th Circuit Court of Appeals justifying the calculations of losses used in this case to sentence Isabel Guerra to incarceration, (R.doc. #229 p.25) also admitting that in this case the Medicare patients had received the prescribed items. (R.doc. 162, p.8)

When questioned by the district court the government acknowledged at trial that it could not tie one single specific claim submitted by Isabel Guerra to any specific fraud, except the general allegation that it was a "paid beneficiary". (R.doc.# 162, p.171, 172) Appeal No: 05-14864-A.

Sentence proceedings.

At sentence on August 25, 2005, the district court agreed with the testimony of CMS Medicare expert Tanya Moore that there was no evidence in this case that the Medicare program had suffered any losses and as such it could not order restitution. (R.doc. #229 pp. 4-7)

But then the district court reversed itself ruling that because of the "fraud" Isabel Guerra was being sentenced to 99 months in jail based on $9,405,114.90 in "losses"to the Medicare program. (R.doc.# 230) A forfeiture order $9,405,114.90 was also entered as part of the sentence.

On page 5 the government admits that the order of forfeiture in the criminal case was vacated sua sponte by the district court and as such there was no final order to appeal asserting that although Petitioner made some "passing references" in the statement of the facts of the brief on appeal, Petitioner "raised no legal challenges to the forfeiture order". Here the government suggests that a legal challenge should have been raised to a vacated non-existing order which would have constituted a frivolous and baseless appeal.

On page 6 the government admits that paying referral fees alone is not the same as having committed health care fraud. There simply was no evidence that Ms. Guerra ever paid any referral fees to any patient of either Ocean or United such being the reason the Court of Appeals ruled that the total amount of "fraud" based on the referral fees paid by Ms. Guerra was limited to $11,800.

On page 7 the government indicates that at the new sentence Ms. Guerra was sentenced based on the $698,551 Ms. Guerra had "laundered".

The government does not tell this Honorable Court that in the decision of *United States v. Isabel Guerra*, Appeal 08-10873, January 9, 2009, the 11th Circuit Court of Appeals clearly ruled where the government wanted to impute the total value of the checks issued by Ms. Guerra as "losses" to Medicare for sentencing purposes. On page 9 of the decision the 11th Circuit ruled as follows:

"Pursuant to §2B1.1, Guerra's base offense level was six. See U.S.S.G. §2B1.(a)(2). While the district court added 14 levels based on its finding that $698,551 was the amount of money laundered, Guerra actually did not merit any additional levels from the

§2B1.1 loss table because she was not responsible for any loss to Medicare. *See Medina*. 485 F.3d. at 1304-05; U.S.S.G. §2B1.1(b)(1)."

"The commentary to this Guidelines includes no provision equating "loss" with the value of the laundered funds. *See generally* U.S.S.G. §2B1.1, comment."

On page 9 the government states that Petitioner does not contend that "the court of appeals decision conflicts with any decision of this Court or any other court of appeals". This is in error. Specifically Petitioner indicated in her petition that such ruling violated the 11th Circuit's own precedent as well as this Honorable Court's rulings as previously stated.

On page 9 the government admits that the preliminary order of forfeiture is final and appealable so it follows that if this final and appealable order is vacated there is no final and appealable order to appeal.

On page 11 and in support of its theory that preliminary order of forfeiture is final and appealable, the government relies on the *United States v. De Los Santos* case. 260 F.3d. 446 (5th Cir. 2002). This case is distinguishable from the instant case and as such inapplicable.

On page 14 the government asserts that the original order of forfeiture of $9.4 million and the subsequent order of $7.6 million is not grossly disproportionate to the gravity of the offense. The government is silent as to the fact that the Court of Appeals only found $11,800 as losses as a result of the offense, and this not because Ms. Guerra had ever filed any false claims with Medicare but rather because she had paid referral fees in that amount.

On this same page the government asserts that whether Ms. Guerra ever caused any losses to Medicare is irrelevant. That she should be liable for the entire forfeiture anyway because she obtained the monies "fraudulently. But this is contrary to the order from the 11th Circuit Court of Appeals.

If Ms. Guerra never caused any losses to Medicare why should she be ordered to forfeit $7.6 million? Is this to make the victim Medicare whole? The alleged victim in this case (Medicare) never suffered any losses.

This Supreme Court then held that the forfeiture would violate the Clause if it were grossly disproportional to the gravity of the defendants' offense (as this Court concluded was the case in *Bajakajian*). *Bajakajian*, at 334.

Where, as here, the funds and property seized were obtained in the course of operating a legitimate business, which caused no losses (to Medicare, or to the patients), it is plainly necessary under *Bajakajian* to apply the excessiveness test to the $7.6 million forfeiture order.

On page 15 the government repeats that the $7.6 million order represents the gross amount received by Ms. Guerra from Medicare for providing legitimate services to Medicare patients for a number of years thereby repeating the government's argument in the district court when seeking the initial and subsequent forfeiture orders of forfeiture which arguments have already been rejected by the Court of Appeals.

Since there is no legal nor factual basis justifying either the original order of forfeiture nor the second order of forfeiture the government then recurs to a selective quotation by counsel for Ms. Guerra to the

effect that there is no way to prove or disprove a proffer made by the government as to the amounts proffered representing the total of all claims filed by a provider over several years of billing. This is a selective quote from a much larger sentence proceeding.

This simply means that the amounts proffered by the government are based on private internal computer printouts from government agencies which are provided to the government by the agencies and bear no resemblance whatsoever to the substantive counts in the indictment and defense counsel has no way to verify each of the tens of thousands of individual claims, some of which may be several years in the past.

The real position of Ms. Guerra at re-sentence was filed *in writing* with the district court prior to the sentence hearing.

On May 21, 2007 Ms. Guerra filed her position at re-sentence indicating, inter alia,

"It is respectfully requested that the orders of forfeiture entered by this Honorable Court on January 11, 2006, and February 7, 2006, based on $9,405,114.90 in losses to the Medicare program be vacated."(D.E.# 451).

SUMMARY OF THE ARGUMENT

Ms. Guerra never waived her forfeiture argument. The new order of forfeiture imposed as part of the new criminal sentence on February 13, 2008 was timely appealed. The previous order of forfeiture of August 25, 2005 was vacated in its entirety when the sentence was vacated and the case remanded for re-sentence.

CONCLUSION

The order of forfeiture of $7,600,000 should be vacated and replaced with an order of forfeiture reflecting the $11,820 affirmed by the 11th Circuit Court of Appeals.

WHEREFORE: Petitioner Isabel Guerra respectfully prays this Honorable court grant her Petition For Writ of Certiorari.

Respectfully submitted,

JULIO C. CODIAS
Counsel of Record
The Four Ambassadors
925 Brickell Bay Drive
Tower 3, Suite 1243
Miami, Florida 33131
(305) 372-8875

Counsel for Petitioner

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